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2590
No. 12299

United States
Court of Appeals
For the Ninth Circuit.

PAUL GAWZNER and IRENE GAWZNER,
Appellants,

vs.

LEO LEBENBAUM,

Appellee.

LEO LEBENBAUM,

Appellant,

vs.

PAUL GAWZNER and IRENE GAWZNER,
Appellees.

Transcript of Record

In Two Volumes

Volume I

Pages 1 to 339

FILED

NOV 25 1949

PAUL P. O'BRIEN, CLERK

Appeals from the United States District Court,
Southern District of California,
Central Division.

No. 12299

United States
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For the Ninth Circuit.

PAUL GAWZNER and IRENE GAWZNER,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

| | PAGE |
|---|---------------|
| Agreed Statement as to Record of Testimony . . | 342 |
| Answer of Defendant Leo Lebenbaum to Second Amended Complaint | 87 |
| Answer to Third Amended Complaint and Cross-Complaint | 72 |
| Exhibit B—Agreement | 82 |
| Appeal: | |
| Certificate of Clerk of Record on | 333 |
| Costs Bond on | 245 |
| Designation of Record on, Joint | 254 |
| Notice of | 240, 244, 247 |
| Statement of Points on | 336 |
| Statement of Points on, Defendants Gawzner | 268 |
| Statement of Points on, Defendant Lebenbaum | 273 |
| Stipulation and Order Extending Time to Docket on | 248, 252 |
| Stipulation Re Record on | 266 |
| Undertaking on | 241 |

| | PAGE |
|---|------|
| Approval of Supersedeas and Cost Bond..... | 243 |
| Certificate of Clerk..... | 333 |
| Concise Statement of Points on Which Appel- lants and Cross-Appellees Intend to Rely... | 337 |
| Costs Bond on Appeal..... | 245 |
| Exhibits, Defendants': | |
| No. 1—Lease | 275 |
| 2—Notice of Termination of Lease.... | 304 |
| A—Financial Statement..... | 310 |
| B—Statement of Profit and Loss..... | 325 |
| Findings of Fact and Conclusions of Law..... | 214 |
| Conclusions of Law..... | 234 |
| Findings of Fact..... | 215 |
| Joint Designation of Record to Be Printed.... | 338 |
| Joint Designation and Stipulation for Tran- script of Record..... | 254 |
| Agreed Statement of Certain Facts..... | 260 |
| Judgment and Decree in Condemnation (In- cluding Deficiency)..... | 53 |
| Judgment Upon Distribution of Award Pro- vided for by Judgment and Decree in Con- demnation | 237 |
| Letter Dated Oct. 13, 1948, to Judge Wein- berger from Thomas H. Hearn..... | 188 |

| | PAGE |
|--|---------------|
| Letter Dated Oct. 13, 1948, to Judge Weinberger from Hill, Morgan and Farrer..... | 190 |
| Memorandum of Conclusions..... | 13, 105 |
| Memorandum Re Proposed Findings of Fact and Conclusions of Law..... | 212 |
| Minute Order Entered April 30, 1946..... | 19 |
| Minute Order Entered Sept. 20, 1948..... | 186 |
| Names and Addresses of Attorneys..... | 1 |
| Notice of Appeal..... | 240, 244, 247 |
| Notice of Motion to File Answer to Third Amended Complaint and Cross-Complaint and Points and Authorities in Support Thereof | 66 |
| Notice of Motion for an Order Directing the Plaintiff to Deliver Possession of Premises to Defendant Leo Lebenbaum..... | 4 |
| Notice of Motion for an Order Excluding Certain Defendants from Participation in Trial Proceedings | 6 |
| Notice of Motion for an Order Releasing Deposited Funds..... | 7 |
| Notice of Opposition to Order Directing the Plaintiff to Deliver Possession of the Premises to the Defendant Leo Lebenbaum..... | 9 |
| Notice of Opposition to Order Releasing Deposited Funds..... | 11 |

| | PAGE |
|--|------|
| Order to Deposit Funds Under Military Appropriations Act..... | 2 |
| Personal Stay Bond, Leo Lebenbaum..... | 250 |
| Petition for Withdrawal of Funds on Deposit.. | 29 |
| Proposed Findings of Fact and Conclusions of Law Upon Distribution of Award Provided for by Judgment and Decree in Condemnation Proposed and Requested to Defendants Paul Gawzner and Irene Gawzner..... | 195 |
| Conclusions of Law..... | 211 |
| Findings of Fact..... | 196 |
| Receipt of Leo Lebenbaum, Filed 6-17-46..... | 28 |
| Receipt of Paul Gawzner, et al, Filed 9-13-46.. | 35 |
| Responsive Statement of Plaintiff in Connection With Defendants' Petition for Withdrawal of Funds on Deposit..... | 33 |
| Statement of Points on Appeal, Defendants Gawzner | 268 |
| Statement of Points on Appeal of Defendant Lebenbaum | 273 |
| Statement of Points on Appeal to Be Relied Upon in This Court..... | 336 |
| Stipulation and Assignment of Interest in Award | 60 |
| Stipulation for Judgment (Including Deficiency) | 45 |

| | PAGE |
|---|----------|
| Stipulation and Order for Extension of Time for Filing Records on Appeal and Docketing Appeals | 248, 252 |
| Stipulation as to Record on Appeal..... | 266 |
| Stipulation Re Payment of Portion of Award and Order of Payment of Funds of Deposit With the Registry of the Court..... | 98 |
| Stipulation in Re Surrender of Possession of Miramar Hotel to Leo Lebenbaum, Tenant... .. | 20 |
| Stipulation in Re Surrender of Possession of Portions of Property Taken by the United States | 23 |
| Third Amended Complaint in Condemnation... .. | 36 |
| Undertaking on Appeal and to Stay Execution | 241 |
| Witnesses, Defendants': | |
| Allen, Edward H. | |
| —direct | 365 |
| —cross | 383 |
| Frisbie, Charles G. | |
| —direct | 386 |
| —cross | 395 |
| Pettegrew, Lloyd S. | |
| —direct | 425, 448 |
| —cross | 433, 451 |
| —redirect | 474, 481 |
| —recross | 484 |

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants and Cross-Appellees:

HILL, MORGAN & FARRER,
ROBERT NIBLEY

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411 West Fifth St.
Los Angeles 13, Calif.

For Appellee and Cross-Appellant:

PAUL R. COTE

118 S. Beverly Drive
Beverly Hills, Calif. [1*]

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States in and
for the Southern District of California,
Central Division

No. 3752-H Civil

UNITED STATES OF AMERICA,
Plaintiff,

vs.

21 ACRES OF LAND, MORE OR LESS, IN THE
COUNTY OF SANTA BARBARA, STATE
OF CALIFORNIA; PAUL GAWZNER,
et al.,

Defendants.

ORDER TO DEPOSIT FUNDS UNDER MILI-
TARY APPROPRIATIONS ACT.

Upon the reading and filing of the written Petition of the plaintiff, the United States of America, for an order to deposit certain funds under the Military Appropriations Act, approved June 28, 1944, on account of the just compensation to be determined in the above entitled action, and it appearing that the defendants, Leo Lebenbaum, Paul Gawzner and Irene Gawzner, by and through their respective counsel, have approved this Order as to form and substance, and good cause appearing therefore,

It Is Hereby Ordered that the plaintiff is hereby permitted to pay into the Registry of this Court the sum of \$52,693.55 as an arbitrary estimate of just compensation for the period commencing July

10, 1944, and ending June 30, 1945, computed on a basis of \$54,000.00 per annum.

It is Further Ordered, Adjudged and Decreed that upon any petition by a party in interest the Court may hereafter order and adjudge that distribution of said proceeds may be made to the persons as decreed by the Court to be entitled thereto at a rate not in excess of \$4,500.00 per month for each month [2] that the plaintiff, the United States of America, has occupied the said premises and that said distribution shall be credited against the amount of the ultimate award, which may be made against the plaintiff, or decreeing the total amount of just compensation to be paid by the plaintiff.

It is Further Ordered that the deposit of said funds is without prejudice to the rights of the plaintiff to contend that the true and just compensation is less than such amount, and is likewise without prejudice to the rights of any party in interest to contend that the true and just compensation is in excess of such amount; that no interest shall accrue or be required to be paid upon the said sum so deposited.

Dated: This 22 day of March, 1945.

/s/ H. A. HOLLZER,
U.S. District Judge

Presented by:

/s/ EUGENE D. WILLIAMS,
Special Assistant to the Attorney General
Attorney for Plaintiff

Approved as to Form and Substance:

/s/ JOHN L. MACE,

Attorney for defendants Paul
Gawzner and Irene Gawz-
ner.

MacFARLANE, SCHAEFER &
HAUN and JULIAN
FRANCIS GOUX,

By /s/ RAYMOND HAUN,

Attorneys for defendant
Leo Lebenbaum.

Receipt of Copy of Notice acknowledged.

[Endorsed]: Filed Mar. 22, 1945. [3]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER DI-
RECTING THE PLAINTIFF TO DELIVER
POSSESSION OF PREMISES TO DE-
FENDANT LEO LEBENBAUM

To the Plaintiff, United States of America, and to
Eugene D. Williams, Special Assistant to the
Attorney General, as counsel and to Defend-
ants Paul Gawzner and Irene Gawzner, and to
Messrs. Hill, Morgan & Farrer, attorneys for
said defendants:

You and each of you will please take notice that
on the 7th day of January, 1946, at the hour of 10
o'clock a.m., in the United States District Court,
United States Post Office and Court House Build-
ing, Los Angeles, California, before the Honorable
Harry A. Hollzer, Judge Presiding, the defendant

Leo Lebenbaum will move said Court for an order directing the plaintiff that upon the surrender of possession of the premises described in the plaintiff's Amended Complaint and which were under lease to the defendant Lebenbaum at the commencement of this action, to deliver the possession of said premises and the whole thereof to the defendant Lebenbaum, subject to all [22] of the terms, covenants and conditions of said lease.

Said motion will be made upon the ground that the defendant Lebenbaum was in the quiet and peaceful possession of said premises at the time of the commencement of this action; that the lease between said defendant and the defendants Gawzner has not been cancelled or terminated by the instant proceedings, and the defendant Lebenbaum is entitled to be restored to the possession of said premises when the plaintiff quits the possession thereof.

Said motion will be based upon the record, pleadings, and files hereof, and upon the Court's determination and conclusions in the pre-trial hearing.

MacFARLANE, SCHAEFER &
HAUN,

By /s/ RAYMOND HAUN,

Attorneys for Defendant

Leo Lebenbaum

Receipt of Copy of Notice acknowledged.

[Endorsed]: Filed Dec. 28, 1945. [23]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER EX-
CLUDING CERTAIN DEFENDANTS
FROM PARTICIPATION IN TRIAL
PROCEEDINGS

To the plaintiff, United States of America, and to Eugene D. Williams, Special Assistant to the Attorney General, as counsel, and to Defendants Paul Gawzner and Irene Gawzner, and to Messrs. Hill, Morgan & Farrer, attorneys for said defendants:

You and Each of You Will Please Take Notice That on the 7th day of January, 1946, at the hour of 10 o'clock a.m., in the United States District Court, United States Post Office and Court House Building, Los Angeles, California, before the Honorable Harry A. Hollzer, Judge Presiding, the defendant Leo Lebenbaum will move said court for an order excluding the defendants Paul Gawzner and Irene Gawzner from participation in the trial of such condemnation proceedings insofar as said proceedings pertain to the real property covered by the written lease between the defendants Paul Gawzner and Irene Gawzner as Lessors and the defendant Leo Lebenbaum as Lessee. [25]

Said motion will be made upon the grounds that the defendants Paul Gawzner and Irene Gawzner are neither necessary nor proper parties defendant to said condemnation proceedings, and are not entitled either to appear or participate in such condemnation trial.

Said motion will be based upon the record, pleadings, and files hereof, and upon the Court's determination and conclusions in the pre-trial hearing, and upon the memorandum of authorities served and filed herewith.

Dated: December 27, 1945.

MacFARLANE, SCHAEFER &
HAUN,

By /s/ RAYMOND HAUN,

Attorneys for Defendant

Leo Lebenbaum.

Receipt of Copy of Notice acknowledged.

[Endorsed]: Filed Dec. 28, 1945. [26]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR AN ORDER
RELEASING DEPOSITED FUNDS

To the plaintiff, United States of America, and to Eugene D. Williams, Special Assistant to the Attorney General, as counsel, and to Defendants Paul Gawzner and Irene Gawzner, and to Messrs. Hill, Morgan & Farrer, attorneys for said defendants:

You and Each of You Will Please Take Notice That on the 7th day of January, 1946, at the hour of 10 o'clock a.m., in the United States District Court, United States Post Office and Court House Building, Los Angeles, California, before the Honorable Harry A. Hollzer, Judge Presiding, the defendant Leo Lebenbaum will move said Court for an order:

1. Releasing to him for payment to the defendants Paul Gawzner and Irene Gawzner a sum of money from the funds deposited by the plaintiff in court equal to the minimum rental payments which are payable to said defendants Gawzner under the terms of the written [28] lease existing between the parties, and covering the period from July 10, 1944, to the date of surrender of possession of the property by plaintiff; and,

2. Releasing to the defendant Leo Lebenbaum from the funds deposited in court by the plaintiff the sum of Fifteen Thousand Dollars (\$15,000.00) for the use of the said defendant in the reopening of the hotel premises and the current expenses thereof, necessitated by the surrender of possession by the plaintiff; and,

3. That such order be made without prejudice to the rights of any persons entitled to claim and receive just compensation for the use and occupancy of the premises, but said funds to be applied upon account of just compensation if and when such compensation be determined by the court.

Said motion will be made upon the grounds that the plaintiff has been in actual possession of and had exclusive use and occupancy of said premises, and that the defendants nor any of them have not received any funds whatsoever therefrom since July 10, 1944, and that the defendants Gawzner are at least entitled to immediate payment of all of the minimum rentals provided to be paid under the terms of said lease.

Said motion will be based upon the record, pleadings, and files hereof, and upon the Court's determination and conclusions in the pre-trial hearing.

Dated: December 27, 1945.

MacFARLANE, SCHAEFER &
HAUN,

By /s/ RAYMOND HAUN,
Attorneys for Defendant
Leo Lebenbaum

Receipt of Copy of Notice acknowledged.

[Endorsed]: Filed Dec. 28, 1945. [29]

[Title of District Court and Cause.]

NOTICE OF OPPOSITION TO ORDER DIRECTING THE PLAINTIFF TO DELIVER POSSESSION OF THE PREMISES TO THE DEFENDANT LEO LEBENBAUM

To the Plaintiff, United States of America, and to Eugene D. Williams, Special Assistant to the Attorney General, and to Defendant, Leo Lebenbaum, and to Messrs. MacFarlane, Schaefer & Haun, Attorneys for said Defendant:

The defendants, Paul Gawzner and Irene Gawzner, hereby oppose the issuance of an order directing the plaintiff to deliver possession of the premises to the defendant, Leo Lebenbaum, upon the following grounds:

1. That one of the issues to be determined in

this case is whether or not the said Leo Lebenbaum is entitled to any compensation as the result of the taking of the property by the Government in afore-said action. That it is the contention of the said defendants Gawzner that the commencement of said action [31] terminated the right of the said Leo Lebenbaum to receive any compensation whatsoever pursuant to the provisions of Paragraph Ten of the lease, by which the said Leo Lebenbaum was in possession of the said property at the time of the commencement of the said action, which provision of said lease is set forth in paragraph IV of the Answer of the said defendants Gawzner to plaintiff's second amended complaint in said action. That said provision of said lease provides that in event the State of California or the County of Santa Barbara or any other public body, shall by condemnation acquire any additional portion of the said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the said lessors, to wit, the said defendants Gawzner. That the said provision of said lease was pleaded in the foregoing Answer of the said defendants Gawzner and is one of the issues of said action to be determined by the Court at the trial of said action.

2. That said provision of said lease above referred to further provides that should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty per cent or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may

terminate the same on thirty days' written notice to the other. That it is further alleged in said Answer of the said defendants Gawzner, that said thirty days' notice was given by them to the said Leo Lebenbaum, and that as a result thereof said lease and the rights of the said Leo Lebenbaum therein under said lease to the property ceased and terminated on September 10, 1944.

Respectfully submitted,

HILL, MORGAN & FARRER,

By /s/ VINCENT MORGAN,

/s/ STANLEY S. BURRILL.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 2, 1946. [32]

[Title of District Court and Cause.]

NOTICE OF OPPOSITION TO ORDER
RELEASING DEPOSITED FUNDS

To the Plaintiff, United States of America, and to Eugene D. Williams, Special Assistant to the Attorney General, and to Defendant, Leo Lebenbaum, and to Messrs. MacFarlane, Schaeffer & Haun, Attorneys for said Defendant:

The Defendants Gawzner hereby oppose the issuance of an order releasing to the defendant, Leo Lebenbaum, from the funds heretofore deposited in Court by the plaintiff, the sum of Fifteen Thousand Dollars (\$15,000.00), or any amount whatsoever, for the use of the said defendant in the reopening of the hotel premises and the current expenses

thereof, or for any use or purpose whatsoever, or at all, upon the following grounds: [34]

1. That the purposes and uses for which said sum is sought to be released by the said defendant, Lebenbaum, are not purposes and uses for which compensation may be paid to the said defendant in said action.

2. That the said defendant, Leo Lebenbaum, as lessee of the premises sought to be condemned by plaintiff at the time of the commencement of said action, has not shown that his interest in and to said property by virtue of said lease is such an interest as to entitle said defendant to any compensation whatsoever. That the right of said defendant Leo Lebenbaum to any compensation in said condemnation action is dependant upon his ability to prove that said lease had a market or bonus value for and during the period of the occupancy of the said property by the Government. That the right of the said defendant to such compensation can only be determined by evidence to be taken at the trial of said action and is one of the issues to be determined in said action.

3. That the said defendant Leo Lebenbaum is not entitled to any compensation in said action by reason of the provisions of Paragraph Ten of the lease under which the said Leo Lebenbaum was lessee at the time of the commencement of said action, which provision of said lease is set forth in paragraph IV of the Answer of the said defendants, Paul Gawzner and Irene Gawzner, to plaintiff's second amended complaint in said action, and

which provision in substance provides that in the event of the acquisition of any additional portion of the leased premises by condemnation by the State of California or the County of Santa Barbara or any other public body, for highway or other public purpose, the amount of the award shall belong solely to the lessor, to wit, said defendants Gawzner.

4. That the amounts heretofore deposited by the plaintiff are wholly inadequate in amount to compensate the defendants Gawzner for the taking of said property by the said plaintiff, and that any payment of any portion of said monies now on deposit [35] to the said Leo Lebenbaum will result in reducing the amount of just compensation to the said defendants Gawzner and will prevent said defendants from receiving the full amount of just compensation due them.

Respectfully submitted,
HILL, MORGAN & FARRER,
By /s/ VINCENT MORGAN,
/s/ STANLEY S. BURRILL.

Receipt of copy acknowledged.

[Endorsed]: Filed Jan. 2, 1946. [36]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS

Judge Weinberger's Calendar April 30, 1946

The above entitled action is one in eminent domain brought by the United States of America for

acquisition of an estate in certain real and personal property described in the second amended complaint, the property commonly known as the Miramar Hotel, at Santa Barbara, California. The defendants in said action are Paul and Irene Gawzner, owners of the property described in the said complaint, Leo Lebanbaum, lessee from defendants Gawzner of a portion of the property involved, and various John Does, with which Doe defendants we are not presently concerned.

The lease took effect December 15, 1943, and by its terms continues until December 31, 1948, with option for a five year renewal. The government acquired an estate in the property involved herein beginning July 10, 1944. Plaintiff's counsel has announced that the United States is ready to terminate its possession of the premises and to tender the same to the person or persons entitled thereto.

The defendant Leo Lebenbaum has presented to the Court for decision three motions which are filed by him on December 28th, 1945 as follows:

No. 1

Motion for an order directing the plaintiff, the United States of America, upon the surrender of the possession of the premises described in the plaintiff's amended complaint and which were under lease to the defendant Lebenbaum at the commencement of this action, to deliver the possession of said premises and the whole thereof to the said defendant Lebenbaum, subject to all the terms, covenants and conditions of said lease.

This motion was made upon the grounds that said defendant was in the quiet and peaceful possession of said premises to the time of the commencement of this action; that the lease between the said defendant and the defendants Paul Gawzner and Irene Gawzner has not been cancelled or terminated by the instant proceedings, and the defendant Lebenbaum is entitled to be restored to the possession of said premises when said plaintiff quits the possession thereof.

Defendants Gawzner have filed notice of opposition to such motion, and contend that the commencement of this action terminated the right of the said Leo Lebenbaum to receive any compensation whatsoever pursuant to the provisions of Paragraph Ten of the lease, and that further, under the provisions of said paragraph and a notice given to the defendant lessee by the defendants lessors, the lease terminated on September 10, 1944.

Defendants Gawzner made a like contention in their first answer filed herein and also in such answer made like [39] assertion concerning the effect of Paragraph Ten of said lease. On June 30, 1945 the late Judge Hollzer rendered an opinion wherein he construed the effect of the condemnation proceedings upon the provisions of the lease, particularly Paragraph Ten thereof, and by said opinion ruled that by the provisions of the lease under consideration the parties thereto did not intend to effect a forfeiture of the lessee's rights under a state of facts such as those disclosed by the record then before Judge Hollzer. We see no

change in the record as it is now before us, except that the interest sought by the government has since been made certain in its duration. We have read the cases cited by Judge Hollzer in his opinion, and have considered the argument of counsel at the hearing before us and the cases cited by them, and conclude that Paragraph Ten of the lease does not refer to condemnation proceedings such as are involved herein, and that the lease has not been affected by such proceedings; that the government should therefore tender possession of the premises to the lessee upon the conclusion of its occupancy.

No. 2

Motion of the defendant Leo Lebenbaum for an order to exclude the defendants Paul Gawzner and Irene Gawzner from participation in the trial of the condemnation proceedings insofar as the same pertain to the real property covered by the written lease between the said defendants Paul Gawzner and Irene Gawzner as lessors and the defendant Leo Lebenbaum as lessee.

Said motion was made upon the ground that the said defendants Paul Gawzner and Irene Gawzner are neither the necessary or proper parties defendant to said condemnation [40] proceedings and are not entitled either to appear or participate in such condemnation trial, insofar as such leased property is concerned.

Plaintiff's complaint makes defendants Gawzner parties to these proceedings and prays that the

interest of each defendant should be determined and a proper apportionment made. It appears to this Court that the defendants Gawzner are necessary parties herein and that they should be allowed to participate at the trial in order that there may be a complete determination of the rights of all the parties herein in relation to all the property involved. The motion to exclude defendants Gawzner from participation in the trial should be denied.

No. 3

Motion of the defendant Leo Lebenbaum:

(a) That the Court release to him for payment to the defendants Paul Gawzner and Irene Gawzner a sum of money from the funds deposited by the plaintiff in Court equal to the minimum rental payments which are payable to the said defendants Gawzner under the terms of the written lease existing between the parties and covering the period from July 10th, 1944 to the date of the surrender of possession of the property by the plaintiff;

(b) That the Court further release to the defendant Leo Lebenbaum from the funds deposited in Court by the plaintiff the sum of \$15,000.00 for use of said defendant in the re-opening of the hotel premises and guarantee expenses thereof necessitated by the surrender of the possession by the plaintiff; and

(c) That such order be made without prejudice to the rights of any persons entitled to claim [41] and receive just compensation for use and occu-

pancy of the premises but said funds to be applied upon account of just compensation as and when such compensation be determined by the Court.

Said above motion is made upon the ground that the plaintiff has been in actual possession of and had exclusive use and occupancy of said premises, and that the defendants, nor any of them, have not received any funds whatsoever therefrom since July 10th, 1944, and that the defendants Gawzner are at least entitled to immediate payment of all minimum rentals provided to be paid under the terms of said lease.

Defendants Gawzner filed their notice of opposition to any order releasing to the defendant Lebenbaum any of the deposited funds. However, at the hearing of the above motions, a discussion was had between counsel regarding the release of certain of said funds, and counsel for defendants Lebenbaum and Gawzner agreed to enter into a written stipulation permitting the release of certain of said funds, said stipulation to be prepared and submitted to the Court for its order in the premises.

Counsel for the Government at said hearing, stated that he had no objections to such release of certain of said funds, provided that said funds be applied on account of the just compensation as and when such compensation be determined by the Court. Said stipulation has not as yet been presented to the Court.

(Copies to counsel.)

[Endorsed]: Filed April 30, 1946. [42]

At a stated term, to wit: The February Term. A.D. 1946, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 30th day of April in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Jacob Weinberger,
District Judge.

[Title of Cause.]

For the reasons set forth in the memorandum of conclusions this day filed herein, It Is Ordered: the motion for an order directing the plaintiff, upon surrender of possession of the premises covered by the lease between defendants Lebenbaum and Gawzners to make such surrender to defendant Lebenbaum is granted.

The motion to exclude defendants Gawzner from participation in the trial of the condemnation proceedings herein is denied.

The motion that the court release certain funds to defendant Lebenbaum is denied except to the extent agreed upon by counsel in open court at the hearing on said motions. Counsel are directed to reduce such agreement to writing and present the same forthwith to the court for its order, said order also to recite that the same is made without prejudice to the rights of any party as the same may appear after a hearing on the merits, and subject to the further order of this court. [43]

[Title of District Court and Cause.]

STIPULATION IN RE SURRENDER OF POSSESSION OF MIRAMAR HOTEL TO LEO LEBENBAUM, TENANT

The above entitled Court having, on April 30, 1946, made and entered its minute order, reading in part, as follows, to-wit:

“It is ordered: That the motion for an order directing the plaintiff, upon surrender of possession of the premises covered by the lease between defendants Lebenbaum and Gawzner, to make such surrender to defendant Lebenbaum, is granted.”

And it appearing from a memorandum entitled “Memorandum of Conclusions,” filed by the Court concurrently with the filing of said minute order, that the following conclusion is stated on page 3, lines 18 to 20, inclusive, to-wit:

“That the government should therefore tender possession of the premises to the lessee upon the conclusion of its occupancy.”

And the plaintiff being desirous of tendering and surrendering possession of said premises and the whole thereof forthwith to said tenant (lessee) Leo Lebenbaum and said defendant, Leo Lebenbaum, being desirous and willing to forthwith accept full, final and exclusive surrender and possession thereof, subject to the conditions hereinafter noted, which conditions are acceptable [44] to the plaintiff;

Now, Therefore, It Is Stipulated:

I.

That the plaintiff may and does hereby immediately tender to defendant, Leo Lebenbaum, full, immediate and complete possession of the Miramar Hotel and of all improvements, furniture and fixtures of every kind and character heretofore taken from him at the time when plaintiff entered into possession, except to the extent that restoration and/or replacement are ultimately determined and required by judgment herein, and said defendant consents and agrees to forthwith accept and receive such surrender and to assume full, complete and exclusive possession thereof.

II.

That the actual date and time of such change in possession and control shall be evidenced by a written receipt executed by defendant Leo Lebenbaum in favor of the United States of America through the War Department, Office of the Division Engineer, Pacific Division, Real Estate Division, Los Angeles Sub-Office, reading as follows, to-wit:

The undersigned, Leo Lebenbaum, lessee of the Miramar Hotel, under the terms and provisions of that certain written lease executed by Paul Gawzner and Irene Gawzner as lessors and Leo Lebenbaum as lessee, dated December 15, 1943, pursuant to that certain stipulation between the undersigned and the United States of America in action entitled "United States v. 21 Acres of Land, more or less, in the County of Santa Barbara, etc. et al., No. 3752-W Civil" now pending in the District Court of the

Southern District of California, Central Division, dated May . . , 1946, acknowledges that he has accepted full, complete and exclusive possession of the Miramar Hotel, Santa Barbara, California, together with all improvements thereon, including all furniture, fixtures and equipment as provided for in said stipulation; that such acceptance became effective on May 31, 1946 at 11:59 o'clock p.m.

(Signed).....

Leo Lebenbaum. [45]

III.

That upon the execution of said written receipt and delivery thereof to a representative of the War Department, the tenancy of the United States shall ipso facto cease and determine.

IV.

That the execution of such receipt, the acceptance of possession of said premises and property, and the termination of such tenancy shall be without prejudice to the right of the defendant Leo Lebenbaum to claim, establish, enforce and receive full compensation for the obligation of the United States to restore said premises and other property to its condition at the time when plaintiff entered into possession, ordinary wear and tear excepted, and shall include a sum equivalent to the rental which shall be finally fixed in this proceeding for the base period between July 10, 1944 and November 20, 1945, computed on a monthly basis, for an additional two (2) months period next following June 1, 1946; which

additional sum shall be paid as part of the compensation for the restoration of the premises.

Dated: May 29, 1946.

UNITED STATES OF
AMERICA,

Plaintiff,

By EUGENE D. WILLIAMS,
Special Assistant to the
Attorney General.

By /s/ EUGENE D. WILLIAMS,
/s/ PAUL R. COTE,
Attorney for Defendant
Leo Lebenbaum.

[Endorsed]: Filed June 17, 1946. [46]

[Title of District Court and Cause.]

STIPULATION IN RE SURRENDER OF POSSESSION OF PORTIONS OF PROPERTY TAKEN BY THE UNITED STATES

The above entitled Court having, on April 30, 1946, made and entered its minute order reading in part as follows, to wit:

“It Is Ordered: That the motion for an order directing the plaintiff, upon surrender of possession of the premises covered by the lease between defendants Lebenbaum and Gawzner, to make such surrender to defendant Lebenbaum, is granted.”

And it appearing from a memorandum entitled

“Memorandum of Conclusions,” filed by the Court concurrently with the filing of said minute order, that the following conclusion is stated on page 3, lines 18 to 20, inclusive, to wit:

“That the Government should therefore tender possession of the premises to the lessee upon the conclusion of its occupancy.”

And, whereas, plaintiff and defendant, Leo Lebenbaum, have heretofore entered into a Stipulation under the terms of which plaintiff has surrendered to, and defendant Leo Lebenbaum has accepted possession of all of the premises [47] known as the Miramar Hotel, Santa Barbara, California, which were taken from him in these proceedings and which on July 10, 1944 were subject to the terms and provisions of a Lease between defendants Gawzner and Lebenbaum, dated December 15, 1943 (a true copy of which is annexed to the Answer of defendant Leo Lebenbaum to plaintiff’s Second Amended Complaint, and marked and identified as “Exhibit A”) and,

Whereas, such other real estate, improvements thereon, personal property and effects as were taken by the plaintiff in this proceeding on July 10, 1944 which were not included in the foregoing described Lease were taken from defendants Paul and Irene Gawzner, and

Whereas, plaintiff desires to and has formally tendered to said defendants Gawzner the immediate surrender of possession thereof, and said defendants Gawzner are agreeable to accepting and receiving possession thereof,

Now, Therefore, It Is Stipulated:

I.

That plaintiff may and does hereby immediately tender to defendants Paul Gawzner and Irene Gawzner, jointly and severally, full, immediate and complete possession of all of the real estate, improvements thereon, effects and personal property which plaintiff heretofore took in these proceedings on July 10, 1944, and which was and is not included within the terms and provisions of the Lease between defendants Gawzner and defendant Leo Lebenbaum, covering what is known as the Miramar Hotel, Santa Barbara, California, and dated December 15, 1943, except to the extent that restoration and/or replacement of any part or portion thereof are ultimately determined and required by Judgment herein, and said defendants, and each of them, consent and agree to forthwith accept and receive such surrender and to assume full, complete and exclusive possession thereof.

II.

That the actual date and time of such change in possession and control shall be evidence by a written receipt executed by defendants Paul and Irene Gawzner in favor of the United States of America through the War Department, Office of the Division Engineer, Pacific Division, Real Estate Division, Los Angeles Sub-Office, reading as follows, to wit:

“The undersigned, Paul and Irene Gawzner, as owner of all the real estate, improvements thereon,

effects and personal property taken by the United States of America in this proceeding (other than as contained in that certain Lease of the Miramar Hotel, Santa Barbara, in which the undersigned are lessors, and one Leo Lebenbaum is lessee, and which Lease is dated December 15, 1943) pursuant to that Stipulation between the undersigned and the United States of America, in an action entitled 'United States of America, v. 21 Acres of Land, more or less, in the County of Santa Barbara, etc., et al., No. 3752-W Civil,' now pending in the District Court of the Southern District of California, Central Division, dated June 10, 1946, acknowledge that they have accepted the full, complete and exclusive possession of the foregoing described property as provided for in said Stipulation; that such acceptance became effective on June . . . , 1946.

(Signed).....

Paul Gawzner

.....

Irene Gawzner''

III.

That upon the execution of said written receipt and delivery thereof to a representative of the War Department, the tenancy of the United States shall ipso facto cease and determine.

IV.

That the execution of such receipt, the acceptance of possession of said premises and property, and the termination of such tenancy shall be without preju-

dice to the right of the defendants, Paul Gawzner and Irene Gawzner, to claim, establish, enforce and receive full compensation for the obligation of the United States to restore said premises and other property to its condition at the time when plaintiff entered into possession, ordinary wear and tear excepted, and shall include a sum equivalent to the rental which shall be finally fixed in [49] this proceeding for the base period between July 10, 1944 and November 20, 1945, computed on a monthly basis, for an additional period next following the date of termination of tenancy as hereinabove fixed in Paragraph III hereof, equivalent to the time which shall subsequently be agreed upon or finally fixed and determined in this proceeding as the reasonable period necessarily required for such restoration.

Dated: June 10, 1946.

UNITED STATES OF
AMERICA,

Plaintiff,

By /s/ EUGENE D. WILLIAMS,
Special Assistant to the
Attorney General,
Attorney for Plaintiff.

HILL, MORGAN & FARRER,

By /s/ STANLEY S. BURRILL,
Attorneys for Defendants,
Paul Gawzner and
Irene Gawzner.

[Endorsed]: Filed June 17, 1946. [50]

[Title of District Court and Cause.]

RECEIPT

The undersigned, Leo Lebenbaum, lessee of the Miramar Hotel, under the terms and provisions of that certain written lease executed by Paul Gawzner and Irene Gawzner as lessors and Leo Lebenbaum as lessee, dated December 15, 1943, pursuant to that certain stipulation between the undersigned and the United States of America in action entitled "United States v. 21 Acres of Land, more or less, in the County of Santa Barbara, etc., et al., No. 3752-W Civil," now pending in the District Court of the Southern District of California, Central Division, dated May 29th, 1946, acknowledges that he has accepted full, complete and exclusive possession of the Miramar Hotel, Santa Barbara, California, together with all improvements thereon, including all furniture, fixtures and equipment as provided for in said stipulation; that such acceptance became effective on May 31, 1946, at 11:59 o'clock p.m.

/s/ LEO LEBENBAUM.

[Endorsed]: Filed June 17, 1946. [52]

[Title of District Court and Cause.]

PETITION FOR WITHDRAWAL OF FUNDS
ON DEPOSIT

To the Honorable District Court of the United States in and for the Southern District of California Central Division, and to the Honorable Jacob Weinberger, Judge thereof:

The petition of Paul Gawzner, Irene Gawzner and Leo Lebenbaum, defendants in the above-entitled action, respectively represents:

I.

The plaintiff above named, the United States of America, pursuant to orders of the Court theretofore made, has deposited in the Registry of the above-entitled Court on account of the just [53] compensation to be determined in the above-entitled action the following sums of money on the dates set opposite such sums, to wit:

| Date | Amounts |
|------------------------|-------------|
| March 23, 1945..... | \$52,693.55 |
| November 20, 1945..... | 13,500.00 |
| April 25, 1946..... | 7,500.00 |
| | <hr/> |
| Total | \$73,693.55 |

II.

There has heretofore been withdrawn from said fund pursuant to order of the above-entitled Court the sum of \$1,594.02, leaving a balance on deposit in the said Registry as of this date the sum of \$72,099.53.

III.

By the terms of the orders authorizing such deposits all or any part of such sum may now be paid out to the parties entitled thereto.

IV.

That these petitioning defendants are the only persons interested in or who have any right to receive any portion of the award which may be made in this action for the use and occupancy by the plaintiff, the United States of America, of the property known as the Miramar Hotel and Bungalows, Santa Barbara County, California, or for the rehabilitation and/or restoration of any of the said property or of the personal property contained therein during the term of the occupancy of said property by said plaintiff; regardless of any allocation of such award which ultimately may be made among these defendants by adjudication or agreement.

V.

That by the terms of the orders heretofore made by this Court authorizing the deposit of said funds, it is provided [54] that upon distribution of the funds so deposited the amount of such distribution shall be credited against the amount of the ultimate award which may be made against the plaintiff herein.

That these petitioning defendants are willing and hereby agree that upon the making of the distribution hereby prayed to be made to them, each and all

of them will acknowledge satisfaction to the extent of the full amount of such distribution of the judgment ultimately to be entered herein fixing the total amount of such compensation to be paid by the plaintiff.

Wherefore these petitioning defendants pray that the Court make its order that there be withdrawn from the funds now on deposit in the Registry of the above-named Court the sum of Sixty-Five Thousand Dollars (\$65,000), which shall be paid to the defendants Leo Lebenbaum, Paul Gawzner and Irene Gawzner, jointly.

Dated this 29th day of August, 1946.

/s/ LEO LEBENBAUM:
PAUL COTE and
THOMAS H. HEARN.

By /s/ THOS. H. HEARN,
Attorneys for Defendant,
Leo Lebenbaum.

/s/ PAUL GAWZNER,
/s/ IRENE GAWZNER.
HILL, MORGAN & FARRER.

By /s/ STANLEY H. BURRILL,
Attorneys for Defendants
Gawzner.

We hereby acknowledge receipt of a copy of the foregoing petition and consent that the same may be granted and that the Court [55] may order the withdrawal from the funds deposited in the Registry of the Court in the above-entitled action the sum of

Sixty-five Thousand Dollars (\$65,000) in accordance with the prayer of the foregoing petition.

JAMES M. CARTER,

United States Attorney for the Southern District of California.

JAMES F. McPHERSON,

Special Assistant to the
Attorney General.

By /s/ PAUL R. SCHNAITTER,

Special Attorney, Department
of Justice.

Attorneys for Plaintiff.

Upon the filing of the foregoing petition in open court and good cause appearing therefor, It Is Hereby Ordered:

I.

That the Clerk of the above-entitled Court shall forthwith pay out of the Registry of this Court from the amounts deposited in the above-entitled action the sum of Sixty-Five Thousand Dollars (\$65,000) to the defendants Leo Lebenbaum, Paul Gawzner and Irene Gawzner jointly.

II.

That the sums so paid out as aforesaid shall be ultimately applied on account of the just compensation as shall hereafter be agreed upon or awarded in the above-entitled action.

Dated this day of, 1946.

.....,

Judge.

[Endorsed]: Filed Aug. 29, 1946. [56]

[Title of District Court and Cause.]

RESPONSIVE STATEMENT OF PLAINTIFF
IN CONNECTION WITH DEFENDANTS'
PETITION FOR WITHDRAWAL OF
FUNDS ON DEPOSIT

On March 5, 1945, there was received in connection with the above action, in the Los Angeles office, Lands Division, Department of Justice, a United States Treasurer's check in the amount of \$52,693.55 payable to the Clerk of the United States District Court for the Southern District of California, together with a letter containing instructions with reference to the deposit of said check. The pertinent instructions contained in the letter were as follows:

“Please secure a stipulation for an order permitting the deposit of the check into the registry of the court for the benefit of the parties entitled thereto, to be distributed in advance of judgment upon proper order of the court, such distribution to be credited against the amount of the ultimate award and to be without prejudice to the right of the owner to claim a larger amount; provided, however, that no distribtuion is to be made in excess of [57] \$4,500.00 per month for each month that the United States has occupied the premises at the time such distribution is made.”

The defendants in this case refused to enter into a stipulation for the order whereupon further instructions were obtained by the Los Angeles office from the Department of Justice authorizing the

filing of a motion for an order permitting the deposit upon the terms hereinabove set forth. Thereafter, such petition was served and filed and on the 22nd day of March, 1945, the Honorable Harry A. Hollzer, United States District Judge, entered an order authorizing plaintiff to pay said sum into the Registry of the Court "as an arbitrary estimate of just compensation for the period commencing July 10, 1944, and ending June 30, 1945," and further providing "that upon any petition by a party in interest the court may hereafter order and adjudge that distribution of said proceeds may be made to the persons as decreed by the Court to be entitled thereto at a rate not in excess of \$4,500.00 per month for each month that the plaintiff, the United States of America, has occupied the said premises, and that said distribution shall be credited against the amount of the ultimate award, which may be made against the plaintiff, or decreeing the total amount of just compensation to be paid by the plaintiff."

Said Order further provided that the deposit was without prejudice to the rights of the plaintiff to contend that the true and just compensation was less than such amount and likewise without prejudice to any party in interest to contend that just compensation was in excess of said amount.

Thereafter on November 20, 1945, and April 25, 1946, deposits of \$13,500.00 and \$7,500.00, respectively, were allowed to be made under similar orders.

The petition for withdrawal of funds on deposit proposed to be filed by the defendants Leo Lebenbaum, Paul Gawzner and Irene Gawzner, has been examined by the attorneys for the plaintiff and, in their opinion, the disbursement prayed for therein, if made, will be in [58] accordance with the conditions set forth in the letter of instruction in connection with said deposits and the orders entered fixing the terms under which such deposits might be disbursed.

Dated: This 29th day of August, 1946.

JAMES M. CARTER,
United States Attorney.

By /s/ IRL D. BRETT,
Special Assistant to the
Attorney General.
/s/ PAUL R. SCHNAITTE,
Special Attorney, Lands
Division,
Department of Justice.

[Endorsed]: Filed Aug. 29, 1946. [59]

[Title of District Court and Cause.]

RECEIPT

The undersigned, Paul and Irene Gawzner, as owners of all the real estate, improvements thereon, effects and personal property taken by the United States of America in this proceeding (other than

as contained in that certain Lease of the Miramar Hotel, Santa Barbara, in which the undersigned are lessors, and one Leo Lebenbaum is lessee, and which Lease is dated December 15, 1943) pursuant to that Stipulation between the undersigned and the United States of America, in an action entitled "United States of America v. 21 Acres of Land, More or Less, in the County of Santa Barbara, etc., et al., No. 3752-W Civil," now pending in the District Court of the Southern District of California, Central Division, dated June 10, 1946, acknowledge that they have accepted the full, complete and exclusive possession of the foregoing described property as provided for in said Stipulation; that such acceptance became effective on June 18, 1946.

/s/ PAUL GAWZNER,

/s/ IRENE GAWZNER.

[Endorsed]: Filed Sept. 13, 1946. [61]

[Title of District Court and Cause.]

THIRD AMENDED COMPLAINT IN
CONDEMNATION

Comes Now the plaintiff, United States of America, by James M. Carter, United States Attorney, as its attorney, and on application of the Secretary of War of the United States of America, hereinafter sometimes referred to as the "requesting officer," and under the direction of and by the au-

thority of the Attorney General of the United States of America, for cause of action against the above named defendants, and each of them, and leave of Court being first duly had and obtained, files this its Third Amended Complaint in Condemnation, and complains and alleges:

I.

That the plaintiff, the United States of America, is entitled to acquire, by the exercise of its power of eminent domain, [63] the property hereinafter referred to and described, for the uses and purposes hereinafter set forth.

II.

That in accordance with the provisions of the hereinafter referred to statutes, said requesting officer, for and in behalf of the United States of America, has designated that the property hereinafter described is suitable and necessary for the purposes of the United States of America, and has selected said property for acquisition by the United States of America in these proceedings, and said selection, designation and determination ever since have been and are now in full force and effect; that the purposes for which the plaintiff is taking the property as hereinafter alleged are necessary and constitute a public use, which use is authorized by law; that the acquisition thereof by plaintiff is and will be of the greatest public benefit and to the least private injury; that the plaintiff is informed and believes, and upon such information and belief alleges, that no part of said property has heretofore been appropriated by any per-

son for any public use, and if any part or portion thereof has heretofore been appropriated to a public use prior to the use of plaintiff, the use to which said property herein sought to be condemned and appropriated by plaintiff will put is a more necessary and paramount public use.

III.

That the plaintiff has named herein by their true names or by fictitious names all defendants known by it to have some interest in said property; that there may be other persons having some interest therein whom the plaintiff hereby identifies as unknown persons, and plaintiff makes such unknown persons defendants herein, to the end that said property may be vested in the United States of America to the extent hereinafter prayed for.

IV.

That plaintiff is informed and believes, and upon such [64] information and belief alleges, that the property hereinafter described constitutes a whole parcel of property, and not a part of such parcel.

V.

That the defendants Doe One to Doe Five Hundred, inclusive, and One Doe Corporation, a corporation, to Twenty-five Doe Corporation, a corporation, inclusive, are sued herein under the fictitious names hereinabove set out, for the reason that the true names of said defendants are unknown to the plaintiff; that when said true names of

said defendants are ascertained, plaintiff will amend its Third Amended Complaint and insert herein the true names of said defendants.

VI.

That any, every and all of the defendants herein named claim and assert some right, title, interest or estate in, or lien, encumbrance, servitude, easement, charge or demand on, or in respect to, the property in this Third Amended Complaint described, or some part thereof.

VII.

That Robert P. Patterson is now, and at all of the times herein mentioned has been, the Secretary of War of the United States of America; that in such capacity as the said Secretary of War he is the requesting officer for the plaintiff, United States of America, on whose application the within Third Amended Complaint in Condemnation is being filed; that he has, while so acting as hereinabove alleged, selected the hereinabove referred to and hereinafter described property for use for the establishment of Redistribution Station and related military purposes, and has designated and determined that the use and occupancy of said property is immediately required in connection therewith, pursuant to the authority of the Acts of Congress hereinafter set out.

VIII.

That this is a suit of a civil nature, brought by the [65] plaintiff under the authority of and pur-

suant to the provisions of an Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; U.S.C. §171), and the Act commonly known as the Second War Powers Act, being, to wit, Act of Congress approved March 27, 1942 (Public Law 507—77th Congress); that funds for the acquisition herein alleged have been appropriated by the Congress of the United States by an Act of Congress approved July 1, 1943 (Public Law 108—77th Congress).

IX.

That the estate or interest to be taken in the hereinabove referred to and hereinafter described property is for a term of years commencing July 10, 1944, and ending June 1, 1946, subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof, any and all improvements and structures placed thereon, by or for the United States.

That the property hereinabove referred to consists of those lands hereinafter described and all personal property located on said lands and used in connection with the operation of the hotel situated thereon, excepting foods and beverages, and also excepting all personal property owned by guests, tenants and employees of said hotel, and excepting, further, the

accounting records of the hotel; that there is annexed to the First Amended Complaint and marked as Exhibit "A," which by such reference is included herein and made a part hereof as if herein set out in full, a list and description of all personal property, the use of which is herein condemned and taken by the plaintiff as herein alleged; that the said lands hereinabove referred to are situated in the County of Santa Barbara, and are more particularly described as follows: [66]

Parcel 1

Lots 8, 9, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25-A, Oceanside Tract, being a portion of Pueblo Lot 32 Montecito School District, in the County of Santa Barbara, State of California, as per County Assessors Book 2, Page 24 on file in the office of the County Assessor of said County.

Excepting therefrom any portion of Lots 17, 18, 19, 20 and 25-A lying within State Highway No. 101.

Parcel 2

A portion of Pueblo Lot 32, shown as Parcel 7 on County Assessors Map, filed in Book 2, Page 24 in the office of the County Assessor in Montecito School District, County of Santa Barbara, State of California.

Excepting therefrom that portion lying within the Southern Pacific Railway Company Right-of-Way and that portion lying within State Highway No. 101.

Containing 7.652 acres, exclusive of the exceptions.

Parcel 3

Lots 37 and 38, Oceanside Beach Tract, being a portion of Pueblo Lot 32, Montecito School District, in the County of Santa Barbara, State of California, as per County Assessors Book 2, Page 28, on file in the office of the County Assessor of said County.

X.

That the apparent and presumptive owners of the hereinabove described property are Paul Gawzner and Irene Gawzner; that said property is commonly and generally known as the Miramar Hotel, Santa Barbara, California.

XI.

That the defendants One Doe Company to Twenty-five Doe Company, inclusive, are corporations duly organized and existing under and by virtue of the laws of one of the States of the United States, and each of them is qualified to do and doing business in the State of California. [67]

XII.

That the said Secretary of War of the United States has determined that the acquisition of the leasehold which is herein sought to be condemned is necessary for use as Redistribution Station and Related Military Purposes, and for such other uses as may be authorized by Congress or by Executive Order, and has determined that immediate and ex-

clusive possession of the said property, the improvements thereon, and the personal property hereinabove referred to is necessary for the prosecution of the present war.

XIII.

That under the provisions of the Second War Powers Act of 1942 it is provided, in part, as follows:

“Upon and after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used and improved for the purposes of the Act, notwithstanding any other law.”

That the Secretary of War has, in accordance with the provisions of the said Second War Powers Act of 1942, determined that the immediate use and occupancy of the above described and referred to property, real and personal, are required in furtherance of the national war effort, and has directed immediate occupancy thereof.

Wherefore, plaintiff prays judgment:

1. That the Court ascertain and assess the value of the leasehold interest herein sought to be condemned and taken in the said property, both real and personal;

2. Adjudging that the public uses for which plaintiff takes and condemns said property are necessary public uses of the plaintiff, and that the uses to which said property are to be applied are uses authorized by law, and that all of the said property so taken is necessary thereto;

3. Vesting in the United States of America the

title and [68] estate in and to the said property as hereinabove alleged, and adjudging that said title and estate in the said property shall be deemed to be condemned and taken for the use of the United States for the purposes and uses hereinabove set forth; and further adjudging that the right to just compensation for the said property hereinabove described shall be vested in the persons entitled thereto as their respective interests may appear and be established by judgment herein;

4. That an Order issue from this Court vesting the right to immediate possession in the plaintiff of all of the property hereinabove described and sought to be condemned in this action, for the use of the United States of America for the purposes and uses hereinabove set forth;

5. That all liens or encumbrances of record against the property herein sought to be taken and condemned be satisfied out of the award to be made in this proceeding;

6. For such other and further relief as the Court deems meet and proper in the premises and as the nature of the case may require.

JAMES M. CARTER,

United States Attorney.

By /s/ IRL D. BRETT,

Special Assistant to the
Attorney General.

Receipt of copy acknowledged.

[Lodged]: Oct. 21, 1946.

[Endorsed]: Filed Oct. 23, 1946. [69]

[Title of District Court and Cause]

STIPULATION FOR JUDGMENT

(Including Deficiency)

It Is Hereby Stipulated by and between the United States of America, plaintiff in the above entitled action, through its attorneys of record, and upon the express authority and direction of the Attorney General of the United States, and defendant Leo Lebenbaum, by Paul R. Cote and Thomas H. Hearn, Esqs., his attorneys of record, and defendants Paul Gawzner and Irene Gawzner, by Hill, Morgan & Farrer, and Stanley S. Burrill, Esqs., their attorneys of record that

Whereas, the above entitled and numbered proceeding has been instituted by plaintiff to determine the just compensation to be paid by it for the condemnation and taking by plaintiff of the estate or interest in the property hereinafter described, together with the damages arising through its obligation to make certain restoration to said property, all as set forth and described in plaintiff's Third Amended Complaint and hereinafter in this Stipulation; and [71]

Whereas, the stipulating parties have agreed upon the compensation to be paid by the plaintiff for such condemnation and taking and such damage, as aforesaid;

Now, Therefore, It is Stipulated and Agreed:

I.

The authority of the United States to execute this Stipulation is the express direction and authorization of the Attorney General of the United States, by David L. Bazelon, Assistant Attorney General, Lands Division, Department of Justice, directed to the United States Attorney at Los Angeles, dated November 22, 1946, and reading as follows to-wit,

“Re condemnation Miramar Hotel, Civil 3752-W. Settlement approved for \$205,000, without interest, providing deficiency paid before January 5, 1947. Davil L. Bazelon, Assistant Attorney General.”

II.

The authority of the above named counsel for the respective defendants who have hereinafter signed and executed this Stipulation is expressly contained and set forth on the last page hereof.

III.

That judgment may be forthwith entered herein in which there is condemned and vested in the United States of America an estate or interest in the property, both real and personal, hereinafter described, for a term of years commencing July 10, 1944, and ending June 1, 1946; subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, and upon the following terms and conditions, to-wit:

(a) That the purpose for which such real and

personal property (hereinafter described) shall be used by plaintiff is for use for the establishment of a Redistribution Station and related military [72] purpose;

(b) That the sum of \$205,000, without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in sub-paragraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by the plaintiff from the defendants, reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration; provided, however, that the deficiency provided for and set forth in sub-paragraph (c) herein shall have been paid into the Registry of this court on or before January 5, 1947; otherwise, and in the event that default be made in the deposit of such deficiency on or before such date, such deficiency shall draw interest commencing January 6, 1947 at the rate of six per cent per annum, such interest to continue until the payment and deposit of the full amount thereof into the Registry of this court;

(c) That plaintiff has heretofore deposited into the Registry of the court, in partial satisfaction

of its obligation to pay just compensation, as provided in sub-paragraph (b) hereof, sums totalling \$73,693.55; that although plaintiff took formal exclusive possession of said premises by order of the Secretary of War, on July 10, 1944, defendant Leo Lebenbaum, who was then [73] the lessee in possession under defendants Paul Gawzner and Irene Gawzner, was, upon his request, permitted and allowed to operate said premises as the Miramar Hotel until noon of July 15, 1944, in consideration of his agreement to pay the United States of America the sum of \$1,672.23, which sum was to be credited in favor of the United States upon any obligation thereof to pay compensation for the taking of said premises; that such total credits amount to the sum of \$75,365.78, and, by reason thereof, there will remain a deficiency of \$129,634.22; that such judgment shall provide that the sum of \$129,634.22, without interest, be paid by plaintiff into the Registry of the court on or before January 5, 1947, and in default thereof, interest at six per cent per annum shall accrue thereon and be paid by plaintiff as heretofore provided in sub-paragraph (b);

(d) That the right heretofore reserved by plaintiff to remove any and all improvements and structures placed on the hereinafter described real property by it within a reasonable time after July 1, 1946, as provided, set forth, and reserved in Paragraph IX of its Third Amended Complaint, is hereby waived, surrendered, and released unto and in favor of whomsoever the Court shall find and determine is the legal owner of such premises.

IV

That if competent witnesses were sworn and testified, their testimony would be that the sum of \$205,000, without interest, together with the surrender of plaintiff's right to remove improvements and structures placed upon said premises by it and the vesting of title thereto in the legal owner of said premises, constitutes fair, just, and adequate compensation to be paid by plaintiff to the parties entitled [74] thereto for the taking of the estate and interest described in Paragraph III in the real and personal property hereinafter described in Paragraph V, together with full satisfaction of all damages which have accrued, or will accrue, by reason of the plaintiff's failure to make restoration, as more particularly set forth and described in subparagraph (b) of Paragraph III.

V

That the property in which the right or interest has been taken by the United States, described in Paragraph III, hereof is more particularly described as follows, to-wit:

Those lands hereinafter described and all personal property located on said lands and used in connection with the operation of the Miramar Hotel situated thereon, excepting foods and beverages, and also excepting all personal property owned by guests, tenants, and employes of said hotel, and excepting further the accounting records of said hotel;

That said lands are situated in the County of

Santa Barbara, State of California, and are more particularly described as follows:

Parcel 1

Lots 8, 9, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25-A, Oceanside Tract, being a portion of Pueblo Lot 32, Montecito School District, in the County of Santa Barbara, State of California, as per County Assessor's Book 2, Page 24, on file in the Office of the County Assessor of said County. Excepting therefrom any portion of lots 17, 18, 19, 20, and 25-A lying within State Highway No. 101. [75]

Parcel 2

A portion of Pueblo Lot 32, shown as Parcel 7 on County Assessor's Map, filed in Book 2, Page 24, in the Office of the County Assessor in Montecito School District, County of Santa Barbara, State of California. Excepting therefrom, that portion lying within the Southern Pacific Railway Company Right of Way and that portion lying within State Highway No. 101. Containing 7.652 acres, exclusive of the exceptions.

Parcel 3

Lots 37 and 38, Oceanside Beach Tract, being a portion of Pueblo Lot 32, Montecito School District, in the County of Santa Barbara, State of California, as per County Assessor's Book 2, Page 28, on file in the Office of the County Assessor of said County.

That the personal property heretofore referred to is listed, described, and set forth in a document marked "Exhibit A," annexed to the First Amended

Complaint herein, which by such reference is included herein and made a part hereof as if herein set out in full.

VI.

That this Court shall retain jurisdiction to determine the amount of the interests of all parties who have appeared in this proceeding, and who may hereafter appear herein, if any, in and to the compensation which shall be ordered paid by the plaintiff in the judgment to be filed pursuant to this Stipulation, the same as though a jury had rendered a verdict for said sum of \$205,000, without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, excepting that defendant, Leo Lebenbaum, shall be deemed to have received upon account of any compensation found to be due him, payment of the sum of \$1,672.23. [76]

These stipulating defendants voluntarily appear in this action and expressly waive service of process, the right of trial by jury, notice of setting of within matter for trial, the preparation, service, and filing of Findings of Fact and Conclusion of law, notice of entry of judgment, and the right to move for new trial or appeal, in so far as the issues which are fixed and determined by this Stipulation and by the Judgment to be entered pursuant thereto are concerned.

Dated: This 26th day of November, 1946.

UNITED STATES OF
AMERICA,

Plaintiff.

By JAMES M. CARTER,

United States Attorney, and

IRL D. BRETT,

Special Assistant to the
Attorney General.

By /s/ IRL D. BRETT,

Its Attorneys.

PAUL R. COTE and THOMAS
H. HEARN.

By /s/ THOS. H. HEARN,

Attorneys for Defendant Leo
Lebenbaum.

I expressly authorize and direct my attorneys Paul R. Cote and Thomas H. Hearn, to execute the foregoing Stipulation in my name and behalf.

Dated: This 26th day of November, 1946.

/s/ LEO LEBENBAUM,

Defendant.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL,

By /s/ STANLEY S. BURRILL,

Attorneys for Defendants

PAUL GAWZNER AND IRENE
GAWZNER.

We expressly authorize and direct our attorneys, Hill, Morgan & Farrer and Stanley S. Burrill, to execute the foregoing Stipulation in our name and behalf.

Dated: This 26th day of November, 1946.

/s/ IRENE GAWZNER,

/s/ PAUL GAWZNER.

[Endorsed]: Filed Nov. 26, 1946. [77]

In the District Court of the United States in and for
the Southern District of California, Central
Division

No. 3752-W Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, more or less, in the County
of Santa Barbara, State of California; PAUL
GAWZNER, et al.,

Defendants.

JUDGMENT AND DECREE
IN CONDEMNATION

(Including Deficiency)

There having been filed and presented to the Court
in the above entitled action a Stipulation for Judg-
ment executed by the plaintiff, United States of
America, by its attorneys of record, and by defend-
ant, Leo Lebenbaum, by Paul R. Cote and Thomas
H. Hearn, Esqs., his attorneys of record, and de-
fendants, Paul Gawzner and Irene Gawzner, by
Hill, Morgan & Farrer and Standley S. Burrill,
Esqs., their attorneys of records; and

It appearing that said stipulating defendants have

voluntarily appeared in this action and have expressly waived service of process, the right of trial by jury, notice of setting the within matter for trial, the preparation, service, and filing of Findings of Fact and Conclusion of Law, notice of entry of judgment, and the right to move for new trial or appeal in so far as the issues which are fixed and determined by said Stipulation and by this Judgment are concerned; and [78]

It appearing that such Stipulation is executed by the United States upon the express direction and authorization of the Attorney General of the United States and is executed by said counsel for and in behalf of the above named defendants upon their express authorization and direction;

Now, Therefore, upon application jointly made by plaintiff and said defendants, and each of them, by and through said attorneys of record and pursuant to said Stipulation,

It Is Hereby Ordered, Adjudged, and Decreed:

I.

That there be and is hereby condemned and vested in the United States of America an estate or interest in the property, both real and personal, hereinafter described, for a term of years commencing July 10, 1944, and ending June 1, 1946; subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, and upon the following terms and conditions, to-wit:

(a) That the purpose for which such real and

personal property (hereinafter described) shall be used by plaintiff is for use for the establishment of a Redistribution Station and related military purposes ;

(b) That the sum of \$205,000, without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in sub-paragraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same conditions as it was when it was received by the [79] plaintiff from the defendants, reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration ; provided, however, that the deficiency provided for and set forth in subparagraph (c) herein shall have been paid into the Registry of this Court on or before January 5, 1947 ; otherwise, and in the event that default be made in the deposit of such deficiency on or before such date, such deficiency shall draw interest commencing January 6, 1947 at the rate of six per cent per annum, such interest to continue until the payment and deposit of the full amount thereof into the Registry of this Court ;

(c) That plaintiff has heretofore deposited into the Registry of the Court, in partial satisfaction of its obligation to pay just compensation, as provided

in sub-paragraph (b) hereof, sums totalling \$73,-693.55; that although plaintiff took formal exclusive possession of said premises by order of the Secretary of War, on July 10, 1944, defendant, Leo Lebenbaum, who was then the lessee in possession under defendants, Paul Gawzner and Irene Gawzner, was, upon his request, permitted and allowed to operate said premises as the Miramar Hotel until noon of July 15, 1944, in consideration of his agreement to pay the United States of America the sum of \$1,672.23, which sum was to be credited in favor of the United States upon any obligation thereof to pay compensation for the taking of said premises; that such total credits amount to the sum of \$75,-365.78, and, by reason thereof, there will remain a deficiency of \$129,634.22; that the sum of \$129,634.22, without interest, be paid by [80] plaintiff into the Registry of the Court on or before January 5, 1947, and in default thereof, interest at six per cent per annum shall accrue thereon and be paid by plaintiff as heretofore provided in sub-paragraph (b);

(d) That the right heretofore reserved by plaintiff to remove any and all improvements and structures placed on the hereinafter described real property by it within a reasonable time after July 1, 1946, as provided, set forth, and reserved in Paragraph IX of its Third Amended Complaint, is hereby waived, surrendered, and released unto and in favor of whomsoever the Court shall find and determine is the legal owner of such premises.

II.

That the property in which the right or interest has been taken by the United States, described in Paragraph I hereof, is more particularly described as follows, to-wit:

Those lands hereinafter described and all personal property located on said lands and used in connection with the operation of the Miramar Hotel situated thereon, excepting foods and beverages, and also excepting all personal property owned by guests, tenants, and employes of said hotel, and excepting further the accounting records of said hotel;

That said lands are situated in the County of Santa Barbara, State of California, and are more particularly described as follows:

Parcel 1

Lots 8, 9, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, and 25-A, Oceanside Tract, being a [81] portion of Pueblo Lot 32, Montecito School District, in the County of Santa Barbara, State of California, as per County Assessor's Book 2, Page 24, on file in the Office of the County Assessor of said County. Excepting therefrom any portion of Lots 17, 18, 19, 20, and 25-A lying within State Highway No. 101.

Parcel 2

A portion of Pueblo Lot 32, shown as Parcel 7 on County Assessor's Map, filed in Book 2, Page 24, in the Office of the County Assessor in Montecito School District, County of Santa Barbara, State of

California. Excepting therefrom that portion lying within the Southern Pacific Railway Company Right of Way and that portion lying within State Highway No. 101. Containing 7.652 acres, exclusive of the exceptions.

Parcel 3

Lots 37 and 38, Oceanside Beach Tract, being a portion of Pueblo Lot 32, Montecito School District, in the County of Santa Barbara, State of California, as per County Assessor's Book 2, Page 28, on file in the Office of the County Assessor of said County.

That the personal property heretofore referred to is listed, described, and set forth in a document marked "Exhibit A," annexed to the First Amended Complaint herein, which by such reference is included herein and made a part hereof as if herein set out in full.

III.

The Court retains jurisdiction hereof to determine the amount of the interests of all parties who have appeared in this proceeding, and who may hereafter appear herein, if any, in and to the compensation which is hereby ordered paid by the plaintiff herein, the same as though a jury had rendered a verdict for said sum of \$205,000, [82] without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, accepting that defendant, Leo Lebenbaum, shall be deemed to have received upon account of any compensation found to be due him, payment of the sum of \$1,672.23.

Dated: This 26 day of November, 1946.

/s/ JACOB WEINBERGER,

Judge of U.S. District Court.

Presented by:

JAMES M. CARTER,

United States Attorney

IRL D. BRETT,

Special Assistant to the At-
torney General

By /s/ IRL D. BRETT,

Attorneys for Plaintiff,

United States of America

Approval as to form and substance and consent to
the entry of said Judgment are hereby given:

PAUL R. COTE and

THOMAS H. HEARN

By /s/ THOS. H. HEARN,

Attorneys for Defendant,

Leo Lebenbaum

HILL, MORGAN & FARRER

STANLEY S. BURRILL

By /s/ STANLEY S. BURRILL,

Attorneys for Defendants,

Paul Gawzner and Irene
Gawzner.

Judgment entered Nov. 26, 1946.

Docketed Nov. 26, 1946.

[Endorsed]: Filed Nov. 26, 1946. [83]

[Title of District Court and Cause.]

STIPULATION AND ASSIGNMENT OF
INTEREST IN AWARD

Whereas, the parties to this stipulation and assignment, to wit, Leo Lebenbaum, Paul Gawzner and Irene Gawzner, are defendants in the above-entitled proceedings; and

Whereas, the said Paul Gawzner and Irene Gawzner as lessors and the said Leo Lebenbaum as lessee made and entered into a lease dated December 15, 1943, of those certain premises commonly known and referred to as Miramar Hotel and Bungalows, Santa Barbara, California, which said lease is hereby referred to for the particulars thereof; and

Whereas, upon the plaintiff in the above-entitled action having taken possession of said Miramar Hotel and Bungalows pursuant [84] to the above-entitled proceedings, the said Leo Lebenbaum transferred to Paul Gawzner and Irene Gawzner the retail liquor license theretofore used in connection with the operation of said Miramar Hotel and Bungalows and thereafter upon the consent of said Irene Gawzner said license was transferred to Paul Gawzner solely; and

Whereas, the said Paul Gawzner and Irene Gawzner have contended and still contend that the aforesaid lease has been cancelled by the filing of the above-entitled action and the Notice of Cancellation dated August 4, 1944, given by the said Paul Gawzner and Irene Gawzner to said Leo Lebenbaum, reference to which said Notice of Cancellation is made for the particulars thereof; and

Whereas, the above-entitled Court has heretofore ruled that said lease has not been cancelled and that possession of said premises should be returned by plaintiff to defendant Leo Lebenbaum and possession of said premises has in fact been returned to said Leo Lebenbaum and he is in possession thereof; and

Whereas, the said Paul Gawzner and Irene Gawzner are contending that said orders are not final but are subject to appeal upon the conclusion of the trial of the above action and the rendition of the Interlocutory Judgment in condemnation therein; and

Whereas, said Leo Lebenbaum has demanded the re-assignment to him of said retail liquor license used in connection with said Miramar Hotel and Bungalows; and

Whereas, the said Paul Gawzner and Irene Gawzner are willing to re-assign said retail liquor license upon condition that such action shall be without prejudice to their rights and upon the further condition that such retail liquor license will be returned to them upon the happening of certain conditions:

Now, Therefore, it is hereby mutually agreed by and between the parties hereto as follows: [85]

I.

Said Paul Gawzner hereby agrees to promptly reassign and transfer said retail liquor license to said Leo Lebenbaum.

II.

Said Leo Lebenbaum agrees that he will not sell, assign, transfer or encumber said retail liquor license or permit the same to be sold, assigned or transferred, and upon the termination of said lease dated December 15, 1943, or the sooner determination thereof, whether such sooner determination of said lease results from the above-entitled litigation or otherwise, the said Leo Lebenbaum shall reassign said retail liquor license to said Paul Gawzner and Irene Gawzner or their nominee, at once.

III.

Each of the parties hereto agree that said retail liquor license is being transferred to said Leo Lebenbaum only to permit him to use the same for the sale of beer, wines and liquors on the premises of said Miramar Hotel and Bungalows and only so long as he is entitled to the possession thereof under said lease dated December 15, 1943, and that said Leo Lebenbaum owns no right, title, interest or estate in said retail liquor license except the right to use the same in conjunction with such lease.

IV.

That this stipulation and assignment is made without prejudice to the rights of any of the parties hereto in said litigation to assert and maintain any and all claims which they have heretofore advanced or may hereafter advance in said litigation and the assignment of said retail liquor license or the acceptance thereof under the terms and conditions

of this stipulation shall not operate to estop the parties hereto, or either of them, to assert any rights for which they have heretofore or may hereafter contend, nor shall [86] the assignment of said retail liquor license or the acceptance thereof be construed to be a relinquishment of any of the rights asserted by any of the parties hereto in such litigation.

V.

Said Leo Lebenbaum agrees to pay all expenses in connection with the reissuance and assignment of said retail liquor license.

VI.

I, said Leo Lebenbaum, first certifying that I have not heretofore made any full or partial assignment thereof, hereby assign to Paul Gawzner and Irene Gawzner and to their heirs, executors, administrators, successors and assigns, all of my rights, titles, interests, estates, benefits, claims, compensation and awards to which I may now be entitled or may hereinafter be entitled under and by virtue of the above-entitled proceedings, including all of my rights, titles, interests, estates, benefits, claims, compensation and awards which I may be entitled to receive from the aforesaid United States of America, or any of its departments or branches, by virtue of said United States of America having taken possession of the property described in the Complaint and Amended Complaints of the above-entitled action or incident thereto, including all my rights of damages for injury done

to said Miramar Hotel and Bungalows and the personal property located therein arising out of the above-entitled proceedings and the rights exercised by the United States of America pursuant thereto, including all my rights, rights of action, claims, damages, debts, awards and rights to awards, compensation and rights to compensation, which I now have or may hereafter acquire by reason of the United States of America having taken possession of the premises described in the Complaint or Amended Complaints on file herein on or about July 10, 1944, and continuing in possession thereof, arising either under the rights exercised by the United States of America by [87] virtue of the above-entitled proceedings, or arising by virtue of the United States of America having taken possession of said premises under said Second War Powers Act, or otherwise; provided however, that the total amount of monies so assigned shall not exceed the sum of \$12,500.00.

And the Condition of This Agreement Is Such that if upon the termination of said lease of said Miramar Hotel and Bungalows dated December 15, 1943, or the sooner determination thereof, said Leo Lebenbaum reassigns to said Paul Gawzner and Irene Gawzner, or their nominee, said retail license, then this assignment shall be of no force and effect, or if such retail liquor license be not so reassigned, then this assignment shall be effective to the extent necessary so that said Paul Gawzner and Irene Gawzner shall be reimbursed for any loss, cost, or

damage suffered by them for the failure of said Leo Lebenbaum to reassign said retail liquor license in accordance with his agreement so to do.

Dated this 23rd day of July, 1946.

/s/ LEO LEBENBAUM,

/s/ PAUL GAWZNER,

/s/ IRENE GAWZNER.

Approved:

PAUL COTE,

By /s/ THOMAS H. HEARN,

Attorneys for defendant,

Leo Lebenbaum,

HILL, MORGAN & FARRER,

By /s/ STANLEY S. BURRILL,

Attorneys for defendants

Gawzner.

Receipt of copy acknowledged.

[Endorsed]: Filed Dec. 12, 1946. [88]

In the District Court of the United States in and
for the Southern District of California, Cen-
tral Division

No. 3752-W Civil

UNITED STATES OF AMERICA,
Plaintiff,

vs.

21 ACRES OF LAND, More or Less, in the County
of Santa Barbara, State of California: PAUL
GAWZNER, et al.,

Defendants,

PAUL GAWZNER and IRENE GAWZNER,
Cross-Complainants,

vs.

LEO LEBENBAUM,
Cross-Defendant.

NOTICE OF MOTION TO FILE ANSWER TO
THIRD AMENDED COMPLAINT AND
CROSS-COMPLAINT AND POINTS AND
AUTHORITIES IN SUPPORT THEREOF

To the United States of America, the plaintiff
above named, and to James M. Carter, United
States Attorney and to Irl D. Brett, Special
Assistant to the Attorney General; [90]

To Leo Lebenbaum, defendant and cross-defendant,
and to Messrs. Paul R. Cote and Thos. H.
Hearn, his attorneys:

You and Each of You Will Please Take Notice that on Tuesday, March 18, 1947, at the hour of 10:00 A.M. in the court room of the Honorable Jacob Weinberger, Judge of the above-entitled Court, on the second floor of the United States Post Office and Court House Building, Los Angeles, California, the defendants and cross-complainants Paul Gawzner and Irene Gawzner will move said Honorable Court as follows:

1. That the matter of the apportionment of the award between the defendants in the above-entitled cause that is presently on the calendar of said Honorable Court for trial on March 18, 1947, at the hour of 10:00 A.M. be placed off calendar for the the reason that said matter is not at issue between the said defendants Paul Gawzner and Irene Gawzner and the defendant Leo Lebenbaum for the reason that there are no present pleadings placing in issue the matter of dispute between said defendants;

2. For leave to file on behalf of the defendants and cross-complainants Paul Gawzner and Irene Gawzner their Answer to the Third Amended Complaint and Cross-Complaint, a copy of which said Answer to the Third Amended Complaint and Cross-Complaint, which it is proposed shall be filed by said Paul Gawzner and Irene Gawzner, is served upon you concurrently with the service of this Notice of Motion and Points and Authorities.

Said motion will be made upon the ground that the above-entitled Court did on October 23, 1946,

permit the plaintiff in the above-entitled action to file its Third Amended Complaint; that said Third Amended Complaint was never served upon the defendants [91] Paul Gawzner and Irene Gawzner after the same was permitted to be filed by the above-entitled Honorable Court; that by the filing of said Third Amended Complaint the Answer theretofore filed by the defendants Paul Gawzner and Irene Gawzner to the Second Amended Complaint was without further force and effect as was the Answer theretofore filed by the defendant Lebenbaum to the Second Amended Complaint and that, accordingly, there are no issues properly framed between the defendants Paul Gawzner and Irene Gawzner and the defendant Leo Lebenbaum showing their respective contentions in reference to the right to the award made in the above-entitled cause and upon the further ground that the proper method by which to frame issues as to the conflicting claims of the respective defendants is by way of cross-complaint.

Dated this 14th day of March, 1947.

HILL, MORGAN & FARRER,

By /s/ STANLEY S. BURRILL,

Attorneys for defendants and cross-complainants,

Paul Gawzner and Irene Gawzner. [92]

Points and Authorities in Support of Motion to
File Answer to Third Amended Complaint and
Cross-Complaint

1. The practice and procedure in this cause conforms to State practice.

Title 40 U.S.C.A. Section 258

2. Plaintiff may be allowed the right to amend upon such terms as may be just and upon notice to the defendants.

Section 473, California C.C.P.

3. Defendants may be allowed the right to answer after the time limited by law.

Section 473, California C.C.P.

4. An amended complaint must be served on all the adverse parties who are to be joined by the judgment and an amended complaint supersedes the original and thereafter the original complaint ceases to have any effect as a pleading.

Linott v. Rowland, 119 Cal. 452, 454

Sheehy v. Roman Catholic Archbishop, 49 Cal. App. (2d) 537, at 539:

“It is general rule, and one which is too well settled to be longer open to question, that when a complaint is amended in substance as distinguished from a mere matter of form it operates to open a default and must be served on all adverse parties affected including the defaulting party.”

At 541:

“Not only did the filing of the amended complaint [93] vacate the default of the defendant entered on December 11, 1935, but it superseded the original complaint which dropped out of the case and ceased to have any effect as a pleading or as a basis for a judgment.”

Gutleben v. Crossley, 13 Cal. App. (2d) 249;

56 Pac. (2d) 954

Collins v. Scott, 100 Cal. 446; 34 Pac. 1085

21 Cal. Juris. 224, Pleadings 156:

“If a complaint is amended on leave after the parties have been brought into court, a copy of the amendments or amended complaint must be served upon all of the defendants to be affected thereby, unless the amendment is in a matter of form, rather than of substance, or unless service is waived by answering.”

21 Cal. Juris. 229, Pleadings, 159:

“A defendant has ten days, after an amendment of a complaint as of course, in which to answer or demur; and he must answer other amendments to the complaint, or the complaint as amended, within ten days after service thereof, or such other time as the court in its discretion may direct.” [94]

5. The proper procedure in a eminent domain action when one defendant claims interests in the property or the award contrary to the claims of the other defendant is to answer the complaint and cross-complain against the other defendants.

People v. Buellton Development Co., 58 Cal.

App. (2d) 178

Section 442, California C.C.P.

6. When a plaintiff amends his complaint in a material matter defendant has a right to plead de novo to the amended complaint.

Wilson v. First National Trust & Savings Bank, 73 Cal. App. (2d) 446, 450; 166 Pac. (2d) 593

7. A defendant may at the time of answering file a cross-complaint or many with permission of the court subsequently file a cross-complaint.

Section 442, California C.C.P.

8. The plaintiff and defendant respectively may be allowed on motion to make a supplemental complaint or answer alleging facts material to the case occurring after the former complaint or answer.

Section 464, California C.C.P.

9. Matters occurring pending the action should be set forth by supplemental pleadings.

21 Cal. Juris., pages 171 and 173, Pleadings, Section 118, 119 [95]

10. Unless a party has suffered an actual loss in some specified particular he should receive no compensation in a condemnation proceedings.

City of Los Angeles vs. Harper, 139 Cal. App. 331

Flood Control District v. Andrews, 52 Cal. App. 788

Receipt of copy acknowledged.

[Endorsed]: Filed March 14, 1947. [96]

[Title of District Court and Cause.]

ANSWER TO THIRD AMENDED
COMPLAINT AND CROSS-COMPLAINT

Come Now the defendants and cross-complainants Paul Gawzner and Irene Gawzner and leave of Court being first had and [98] obtained file this their answer to plaintiff's Third Amended Complaint and Cross-Complaint against the defendant and cross-defendant Leo Lebenbaum as follows.

Answering plaintiff's Third Amended Complaint the defendants Paul Gawzner and Irene Gawzner admit, deny and allege as follows:

I.

That said Paul Gawzner and Irene Gawzner admit the allegations in Paragraphs I, II, IV, VII, VIII, IX, X, XII and XIII of plaintiff's Third Amended Complaint.

II.

That said Paul Gawzner and Irene Gawzner allege that they are now and at all times mentioned herein were the owners of the property sought to be condemned herein and that no other person or persons, whether named in said Third Amended Complaint or otherwise, have any right, title, interest, estate, claim or lien in and to said property.

III.

That said Paul Gawzner and Irene Gawzner allege that on or about the 15th day of December, 1943, that said Paul Gawzner and Irene Gawzner

executed a written lease whereby they, as lessors, leased to said Leo Lebenbaum, as lessee, for a term of five (5) years and fifteen (15) days, commencing on December 15, 1943, and ending on December 31, 1948, a portion of the property described in plaintiff's Third Amended Complaint. That attached hereto, marked "Exhibit A" and made a part hereof as though herein set forth at length is a true and correct copy of said lease. That pursuant to said lease said Leo Lebenbaum entered into the possession of the leased premises and continued in possession thereof until the date of taking by the plaintiff as hereinafter set forth.

That the property sought to be condemned and described [99] in the Third Amended Complaint includes certain property owned by said Paul Gawzner and Irene Gawzner, which is not included within, nor subject to said lease, to wit:

(a) Lots 13, 15, 16, 17, 18 and 25-A of Ocean-side Tract as described in said Third Amended Complaint;

(b) That portion of Parcel No. 2 described in said Third Amended Complaint which lies outside of the boundaries of the leased property as described in said lease, Exhibit A; and

(c) Lots 37 and 38 Oceanside Beach Tract as described in said Third Amended Complaint.

The property sought to be condemned by said Third Amended Complaint includes, however, all of the leased property as described in said lease, Exhibit A.

Upon the filing of the original complaint herein and on July 10, 1944, the plaintiff took possession of the property described in said complaint and the Third Amended Complaint and retained the possession thereof to and including June 1, 1946.

IV.

That said Paul Gawzner and Irene Gawzner allege that pursuant to the provisions of Paragraph X of said lease, Exhibit A, the said Paul Gawzner and Irene Gawzner on August 11, 1944, served upon said Leo Lebenbaum thirty (30) days written notice of termination of said lease by reason of the condemnation of the leased premises as set forth in the original complaint on file herein, being the same property sought to be condemned by the Third Amended Complaint, and by reason thereof said lease terminated on September 10, 1944.

Allege that by reason of the provision of Paragraph X [100] of said lease, Exhibit A, the entire amount of any award in this condemnation proceeding belongs solely to said Paul Gawzner and Irene Gawzner.

V.

The said Paul Gawzner and Irene Gawzner further allege that said Leo Lebenbaum has not, since the commencement of this action and the taking of possession of the property referred to in plaintiff's original Complaint, Second Amended Complaint and Third Amended Complaint, paid any of the rental or other moneys provided for by said lease, Exhibit A, and has not complied with any of the

other provisions thereof during the period described in said Third Amended Complaint, nor has said Leo Lebenbaum paid to said Paul Gawzner and Irene Gawzner any sum of money whatsoever for said period of July 10, 1944, to June 1, 1946.

VI.

That said Paul Gawzner and Irene Gawzner further allege that upon the termination by the said plaintiff of the taking, use and occupation of said property the said plaintiff became obligated to restore said property described in said Third Amended Complaint in the same condition that it was in prior to the taking by the plaintiff and to place the same in condition for its operation as a hotel. That plaintiff failed to make such restoration.

That said Paul Gawzner and Irene are further informed and believe and, therefore, allege that by the use and occupation of the said property by the said plaintiff the said premises have become permanently depreciated and damaged.

The said Paul Gawzner and Irene Gawzner further allege that the plaintiff was obligated to pay just compensation for the taking of the property described in the Third Amended Complaint for the period therein set forth and for the said restoration of said premises. [101]

VII.

The said Paul Gawzner and Irene Gawzner further allege that on or about November 26, 1946,

a Judgment and Decree in Condemnation was made and entered in the above-entitled cause, reference to which said Judgment is hereby made for the terms and particulars thereof. That said Judgment in substance provided that there was condemned and vested in the plaintiff an estate or interest in the property described in plaintiff's Complaint, Second Amended Complaint and Third Amended Complaint, both real and personal, for a term of years commencing July 10, 1944, and ending June 1, 1946, and which said Judgment fixed the just compensation to be paid by plaintiff in the sum of \$205,000 as full settlement and satisfaction of its obligation for the taking of such interest or estate, together with all compensation to be paid as damages arising out of any failure or default on the part of plaintiff in performance of its obligation to restore such premises so taken by it to the same condition as they were in when received by the plaintiff, including compensation for the time estimated to be required for the completion of such restoration.

Allege that said Judgment further provided that the Court retain jurisdiction of the within cause to determine the amount of the interests of all parties who have appeared in said proceeding and who might thereafter appear in said proceeding, if any, in and to the compensation which was thereby ordered paid by the plaintiff, the same as though a jury had rendered a verdict for said sum of \$205,000 as their total award for all interests taken by the plaintiff in this proceeding and full

satisfaction of all claims for damages against the United States arising from such taking, excepting that said Leo Lebenbaum shall be deemed to have received upon account of any compensation found to be due him the payment of the sum of \$1,672.23.

Come Now the Defendants and Cross-Complainants Paul Gawzner and Irene Gawzner and Complain of the Defendant and Cross-Defendant Leo Lebenbaum and for Cause of Action Allege:

I.

Cross-complainants Paul Gawzner and Irene Gawzner re-allege and incorporate by reference, as though herein set forth at length, the admissions, denials and allegations set forth in Paragraphs I to VII, inclusive, of their Answer to the Third Amended Complaint hereinabove set forth.

II.

That upon the termination of the use of the premises described in plaintiff's Third Amended Complaint by said plaintiff, the United States of America, possession of the same was returned to cross-defendant Leo Lebenbaum on or about June 1, 1946.

III.

That said cross-complainants Paul Gawzner and Irene Gawzner contend and allege that the said lease, Exhibit A, has been cancelled, by the institution of the above-entitled proceedings and the giving of notice by the said cross-complainants to the

said cross-defendant, on September 11, 1944, as hereinabove set forth.

IV.

That subsequent to June 1, 1946, and prior to July 23, 1946, the said cross-complainants Paul Gawzner and Irene Gawzner refused to recognize said cross-defendant Leo Lebenbaum as lessee of said premises or entitled to the possession thereof and refused to accept rental payments from him contending that the said lease had been cancelled as aforesaid. [103]

V.

That on or about July 23, 1946, the said cross-complainants Paul Gawzner and Irene Gawzner and cross-defendant Leo Lebenbaum made and entered into a certain agreement in writing covering the continued possession of the said Leo Lebenbaum in and to said premises described in said lease dated December 15, 1943, Exhibit A; that attached hereto, marked "Exhibit B" and made a part hereof as though herein set forth at length is a true and correct copy of said agreement. [104]

XX.

Cross Complainants Paul Gawzner and Irene Gawzner allege that said cross defendant Leo Lebenbaum has failed to comply with the terms of said agreement of July 23, 1946, Exhibit B, in that he, said Leo Lebenbaum, has failed to maintain the premises described in said lease, Exhibit A, in the condition required by said lease.

XXI.

That said Leo Lebenbaum has not since June 1, 1946, restored said premises to the condition they were in at the time the [109] United States of America took possession of said premises on July 10, 1944.

XXII.

That cross complainants Paul Gawzner and Irene Gawzner allege that said cross defendant Leo Lebenbaum by reason of the allegations hereinabove set forth is not entitled to receive any share or portion of the award heretofore made in the above-entitled proceedings by said Judgment dated November 26, 1946, for the restoration of said premises.

XXIII.

That cross complainants Paul Gawzner and Irene Gawzner are informed and believe and, therefore, allege that said cross defendant Leo Lebenbaum's interest in said lease dated December 15, 1943, Exhibit A, did not have a market or bonus value on July 10, 1944, irrespective of whether the same was cancelled by the institution of the within cause of action and the giving of the notice, hereinabove referred to, or not, and, therefore, allege that said cross defendant Leo Lebenbaum is not entitled to any share or portion of the award heretofore made in the above-entitled proceedings by said Judgment dated November 26, 1946, for the rental value or use of said premises.

XXIV.

That cross complainants Paul Gawzner and Irene Gawzner further allege that the cross defendant Leo Lebenbaum is not entitled to any share or portion of the award heretofore made in the above-entitled proceedings by said Judgment dated November 26, 1946, for the premises not covered by said lease, Exhibit A.

XXV.

That cross complainants Paul Gawzner and Irene Gawzner further allege that said cross defendant Leo Lebenbaum is not entitled [110] to any share or portion of the award heretofore made in the above-entitled proceedings by said Judgment dated November 26, 1946, for the restoration of the exterior of said premises covered by said lease, Exhibit A.

XXVI.

That Paragraph Ten of said lease, Exhibit A, provides that the amount of the award in any condemnation suit referred to in said paragraph shall belong solely to the lessors therein named, to wit, cross-complainants Paul Gawzner and Irene Gawzner. That by reason of the provisions of said Paragraph Ten said cross-defendant Leo Lebenbaum is not entitled to any share or portion of the award heretofore made in the above-entitled

proceedings by said Judgment dated November 26, 1946.

XXVII.

That said Leo Lebenbaum has heretofore received upon account of any compensation found to be due him, if any, the sum of \$1672.23, all as heretofore found by said Judgment dated November 26, 1946. That said cross-defendant Leo Lebenbaum was not entitled to receive such sum of \$1672.23 from the plaintiff in the above-entitled proceedings and, therefore, said cross-defendant received said sum of \$1672.23 for the use and benefit of cross-complainants.

Wherefore, the defendants and cross-complainants Paul Gawzner and Irene Gawzner pray:

1. That the Court find that Paul Gawzner and Irene Gawzner are the only persons who have any interest in or to the award made in the above-entitled proceedings by said Judgment dated November 26, 1946, and that the Court shall order that there be paid out of the Registry of the Court all funds heretofore deposited in the Registry [111] of the Court by the plaintiff in the above-entitled proceedings pursuant to said Judgment dated November 26, 1946, which have not heretofore been paid and that the Court further determine that said defendant and cross-defendant Leo Lebenbaum is not entitled to receive and portion of said award of \$205,000 fixed and determined by said Judgment dated November 26, 1946, in the above-entitled proceedings; and

2. For such other and further relief as to the Court seems proper.

HILL, MORGAN & FARRER.

By /s/ STANLEY S. BURRILL,
Attorneys for Defendants and Cross-Complainants
Paul Gawzner and Irene Gawzner. [112]

EXHIBIT B

Agreement

Whereas, the parties hereto Paul Gawzner and Irene Gawzner, as lessors, and Leo Lebenbaum, as lessee, made and entered into a lease dated December 15, 1943, of those certain premises commonly known and referred to as Miramar Hotel and Bungalows, Santa Barbara, California, which said lease is hereby referred to for the particulars thereof; and

Whereas, on or about July 10, 1944, the United States of America filed an action in condemnation in the District Court of the United States in and for the Southern District of California, Central Division, entitled "United States of America, plaintiff, vs. 21 Acres of Land, More or Less, in the County of Santa Barbara, etc., Paul Gawzner, et al, defendants," being numbered therein 3752-W Civil, seeking to acquire the use and possession of said Miramar Hotel and Bungalows for a term of years, reference to which said action is hereby made for the particulars thereof; and

Whereas, the said Paul Gawzner and Irene Gawzner contended and still contend that the aforesaid

lease has been cancelled by the filing of the above-referred to action and the Notice of Cancellation dated August 4, 1944, given by said Paul Gawzner and Irene Gawzner to said Leo Lebenbaum, reference to which said Notice of Cancellation is made for the particulars thereof; and

Whereas, the Court in said above referred to action has heretofore ruled that said lease has not been cancelled and that possession of said premises be returned by the plaintiff therein named to said Leo Lebenbaum and possession of said premises has in fact been returned to said Leo Lebenbaum and he is in possession thereof; and [113]

Whereas, the said Paul Gawzner and Irene Gawzner are contending that said orders are not final but are subject to appeal upon conclusion of the trial of the above-referred-to action and the rendition of the interlocutory judgment in condemnation therein; and

Whereas, said Leo Lebenbaum has been in possession of said premises since June 1, 1946, and is contending that he is lawfully in possession thereof under said lease and is willing to pay the rent called for by said lease for the period of time he is in occupancy of said premises after June 1, 1946, and did in fact make a tender of a portion of said rent on June 1, 1946, which was refused by said Paul Gawzner and Irene Gawzner for the reason that they are contending the said lease has been cancelled and said Leo Lebenbaum is not lawfully in possession of said premises and that

said Leo Lebenbaum is a trespasser on said premises and liable to said Paul Gawzner and Irene Gawzner as such; and

Whereas, the parties hereto have concurrently herewith executed certain other stipulations and agreements:

Now, Therefore, in consideration of the premises and the mutual covenants herein contained, it is hereby agreed as follows:

I.

Leo Lebenbaum will promptly pay to said Paul Gawzner and Irene Gawzner all sums of money which said Paul Gawzner and Irene Gawzner should receive as rent under the terms of said lease commencing as of June 1, 1946, and will make all other payments and deposits and otherwise comply with the terms of said lease, the same as though said lease was in full force and effect so long as he, the said Leo Lebenbaum, is in possession of said Miramar Hotel and Bungalows.

II.

If upon final determination of the above-referred-to action it be determined that said lease was in law and in fact cancelled [114] by the filing of said action and the giving of such notice of cancellation by said Paul Gawzner and Irene Gawzner, then said Paul Gawzner and Irene Gawzner agree that upon said Leo Lebenbaum delivering possession of said Miramar Hotel and Bungalows including all of the furniture, furnishings, tools, implements and

other personal property used in the operation of the same in good order and condition, including the retail liquor license used in connection therewith, to said Paul Gawzner and Irene Gawzner, they, said Paul Gawzner and Irene Gawzner, will accept such payments as full compensation for the use and occupancy of said Miramar Hotel and Bungalows, including the said furniture, furnishings, tools, implements and other personal property and retail liquor license by said Leo Lebenbaum subsequent to June 1, 1946; that this agreement shall be effective only for the period subsequent to June 1, 1946, and shall not be construed to have any effect upon the award or the share or shares thereof which said parties are entitled to receive in the above-referred-to action.

III.

This agreement is made without prejudice to the rights of any of the parties hereto to assert and maintain in the litigation hereinabove referred to any and all claims which they have heretofore advanced or may hereafter advance in said litigation and the payment of said funds or the acceptance thereof under the terms and conditions of this agreement shall not operate to estop the parties or either of them to assert any rights for which they have heretofore or may hereafter contend, nor shall the payment of said funds or the acceptance thereof be construed to be a relinquishment of any of the rights asserted by any of the parties in such litigation.

IV.

Said Leo Lebenbaum hereby consents that the said Paul Gawzner and Irene Gawzner may lease the main floor of the garage [115] building referred to in said lease to any third person, firm or corporation to be used for the purpose of service station and garage, including storage and repair of automobiles, provided that said Leo Lebenbaum shall be granted use rent free of at least one-half of the basement of said garage building either for the storage of cars of his guests or his own supplies and materials.

In Witness Whereof the parties hereto have hereunto set their hands this 23rd day of July, 1946.

/s/ LEO LEBENBAUM,

/s/ PAUL GAWZNER,

/s/ IRENE GAWZNER.

[Lodged]: March 14, 1947.

[Endorsed]: Filed Mar. 18, 1947. [116]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 3752-H Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, MORE OR LESS, IN THE
COUNTY OF SANTA BARBARA, STATE
OF CALIFORNIA; PAUL GAWZNER;
IRENE GAWZNER; LEO LEBENBAUM;
DOE ONE TO DOE FIVE HUNDRED, IN-
CLUSIVE; ONE DOE CORPORATION, a
Corporation, TO TWENTY-FIVE DOE COR-
PORATION, a Corporation, Inclusive,
Defendants.

ANSWER OF DEFENDANT LEO LEBEN-
BAUM TO SECOND AMENDED COM-
PLAINT

Comes now the defendant, Leo Lebenbaum, and
answering the Second Amended Complaint for him-
self alone, admits, denies, and alleges:

I.

Admits the allegations of Paragraphs I, II, III,
V, VII, VIII, XI, XII, and XIII.

II.

Answering Paragraph IV this defendant denies
that the property described in the complaint con-
stitutes a whole parcel of property and not a part

of such parcel, and alleges, as more fully set forth in the affirmative defense hereto, that there are differing estates in different parts or portions of the property described. [117]

III.

In answer to Paragraph VI of said complaint, this defendant admits that he claims and asserts some right, title, interest, and estate in and in respect to a portion of the property described in said complaint, the nature and extent of the estate of this defendant being fully and at length set forth in the affirmative defense filed as a part hereof, and denies that any other person or defendant claims or asserts any right, title, interest, or estate in or in respect to the real property described in the affirmative defense made a part hereof, except as such right, title, interest, or estate may be subject and subordinate to the estate of this defendant. This defendant further alleges that the right, title, interest, and estate of this defendant in and to the portion of the real property described in the complaint and in which this defendant has such estate, is fully and at length set forth in the affirmative defense made a part hereof.

IV.

In answer to Paragraph IX this defendant admits each and all of the allegations thereof, except that this defendant denies that the estate or interest to be taken in the premises described in the complaint is for a term of years commencing July

10, 1944, and ending November 20, 1945, and alleges that the date of expiration of said term is June 30, 1946, as is hereinafter affirmatively alleged.

V.

In answer to Paragraph X, this defendant denies each and all of the allegations thereof except that this defendant admits that Paul Gawzner and Irene Gawzner are the owners of the property described in the affirmative defense made a part hereof, subject, however, to the leasehold estate and interest of this defendant as fully and at length set forth in said Affirmative Defense made a part hereof.

By Way of a First Affirmative Defense Herein,
This Defendant Alleges:

I.

That he claims and asserts a right, title, interest, and estate in and to that portion of the property described in the complaint as is more fully set forth and described herein, and alleges that the estate of this defendant is a leasehold estate acquired under and by virtue of a certain written lease hereinafter referred to.

II.

This defendant alleges that on or about the 15th day of December, 1943, this defendant, as lessee, and Paul Gawzner and Irene Gawzner, husband and wife, as lessors, made, executed and entered into a certain written lease providing for an original term of five years and fifteen days commencing on

the 15th day of December, 1943, and ending on the 31st day of December, 1948, and with an option on the part of the lessee to renew and extend the term of said lease for an additional period of five years, but providing that such option of renewal be exercised on or before June 30, 1948. The said lease covered that portion of the property described in plaintiff's complaint as is more particularly described as follows:

The furnished hotel known as Miramar Hotel and Bungalows, situated upon that certain real property in El Montecito, County of Santa Barbara, State of California, to wit:

Parcel A: Beginning at the southeast corner of Jacob Oleson's land surveyed March 29, 1876; thence 1st north 1606 feet to the northeast corner of aforementioned tract; 2nd, east 176.39 feet to the northwest corner of Dayton's land; 3rd, south 495 feet; thence 4th, east 293.81 feet; thence [119] 5th, south 478.37 feet more or less to a point in the center line of the Coast Highway at the northwesterly corner of Parcel Two as described in deed to Paul Gawzner recorded in Book 484 of Official Records of said County at page 4; thence 6th, north $70^{\circ}16'$ west along the center line of said Coast Highway 23.70 feet; thence south $0^{\circ}27'$ west 327.38 feet to the beginning of a curve to the right having a central angle of $83^{\circ}01'$ and a radius of 40 feet; thence along said curve a distance of 57.96 feet to the beginning of a tangent to said curve; thence along said tangent south $83^{\circ}28'$ west 202.70 feet;

thence south 4°03' east to a point in the southerly line of Parcel Four of the above mentioned Gawzner deed; thence westerly along said southerly line of Parcel Four to the point of beginning.

Excepting, however, all that portion thereof lying north of the center line of the Coast Highway as now located.

Also Excepting that portion thereof lying within the lines of the strip of land known as the Southern Pacific right of way.

Also Excepting that portion thereof, if any, included within the lines of the tract of land quit-claimed to David S. Cook, Sr., by Emmeline Doulton, by deed dated December 19, 1903, and recorded in Book 98, at page 86 of Deeds, records of said County.

Also Excepting therefrom that portion thereof covered by that certain deed from Paul Gawzner, et ux, to the State of California, recorded in [120] Book 552, at Page 275, Official Records of Santa Barbara County, California.

Parcel B: Lots 8, 9, 12, 19, 20, 21, 22, 23, and 24 of Ocean Side subdivision, in said County of Santa Barbara, State of California, according to the map thereof recorded in Book 1, at page 29 of Maps and Surveys in the office of the County Recorder of said County and the following described portion of Lot 13 of said subdivision:

Beginning at the southeasterly corner of said Lot 13 in the center of Ocean Avenue; thence west along the south line of said Lot 13, 240.24 feet more or less to the southwesterly corner thereof; thence

north along the west line of said lot 6.42 feet; thence east 138.54 feet; thence south $77^{\circ}39'$ east 14.02 feet; thence east 88.0 feet to a point in the easterly line of said lot in the center of Ocean Avenue; thence south along said east line 3.42 feet to the point of beginning.

Excepting from said Lots 21, 22, and 23, the westerly twenty feet thereof, as reserved "for road purposes" in the deed from Elizabeth A. Humphry, et al, to Harriet Dorr Doulton, dated March 27, 1899, and recorded in Book 66, at page 427 of Deeds, records of said County.

Also Excepting from said Lot 24, the southerly and westerly twenty feet thereof, as reserved "for road purposes" in the deed from Elizabeth A. Humphry, et al, to Mrs. H. M. A. Postley, dated January 31, 1899, and recorded in Book 66, at page 73 of Deeds, records of said County.

Also Excepting from said Lots 19 and 20 [121] the portions thereof covered by that certain deed from Paul Gawzner, et ux, to the State of California, recorded in Book 552, at page 275, Official Records of Santa Barbara County, California.

Parcel C: Beginning at a point on the easterly line of Parcel Two as described in deed to Paul Gawzner recorded in Book 484 of Official records of said County at page 4, said point being distant thereon south $0^{\circ}32'30''$ west 232.10 feet from the northeasterly corner thereof; thence along said easterly line of Parcel Two south $0^{\circ}32'30''$ west 96.12 feet to the southeasterly corner thereof; thence

along the southerly line of said Parcel Two north $88^{\circ}55'$ west 80.03 feet to the beginning of a curve to the right having a central angle of $89^{\circ}22'$ and a radius of 25 feet; thence along said curve 38.99 feet to the beginning of a tangent to said curve; thence along said tangent north $0^{\circ}27'$ east 51.10 feet; thence south $89^{\circ}33'$ east 88.0 feet; thence north $0^{\circ}27'$ east 19.0 feet; thence south $89^{\circ}33'$ east 16.91 feet to the point of beginning.

Parcel D: A right of way for road purposes for the benefit of the lands described in Parcels A, B and C above, over the following land:

Beginning at the northwesterly corner of Parcel two as described in the above-mentioned Gawzner deed said corner being on the center line of the Coast Highway; thence along said center line north $70^{\circ}16'$ west 23.70 feet; thence south $0^{\circ}27'$ west 327.38 feet; thence south $89^{\circ}33'$ east 30.0 feet; north $0^{\circ}27'$ east 316.88 feet to a point in the center line of the Coast Highway; [122] thence along said center line north $70^{\circ}16'$ west 8.08 feet to the point of beginning.

In addition to the real property so described, the said lease covered and included all of the improvements situated upon the said real property and all of the furniture, furnishings, tools, implements, and other personal property used in the operation of the hotel erected and constructed upon said real property, an itemized inventory of said personal property having been made and identified by the parties to said lease.

Said written lease contained all of the terms, covenants and conditions with respect to the said leasehold estate, and a copy of said lease is hereto annexed, marked Exhibit "A" and made a part hereof, to all intents and purposes and with like force and effect as though fully and at length set forth herein.

III.

That in accordance with and pursuant to said lease, this defendant entered into possession of the leased premises and the whole thereof and continued to occupy and be in the possession thereof until the date of taking by the plaintiff and his eviction therefrom by the plaintiff on or about July 10, 1944, and the plaintiff has at all times since retained the possession of the leased premises and the whole thereof and has occupied and used said leased premises to the exclusion of this defendant.

IV.

That the co-defendants, Paul Gawzner and Irene Gawzner, the lessors under said lease, have asserted and maintained that the leasehold estate of this defendant was terminated and ended by reason of the acts of the plaintiff in the taking of possession of said leased premises and said co-defendants have further asserted and maintained that the leasehold estate of this defendant has been terminated by virtue of Paragraph Ten of said lease, but this de-

fendant alleges that the said leasehold estate has not been [123] terminated and ended either by the acts of the plaintiff or under any of the provisions of the said lease, and that this defendant is entitled to the full use and enjoyment of the leased premises subject only to the temporary right of occupancy thereof by the plaintiff upon payment of just compensation by the plaintiff to this defendant and upon the termination of such temporary occupancy by the plaintiff, this defendant is entitled to re-occupy, use, and be restored to the full possession and enjoyment of the said leasehold estate.

V.

That with respect to that portion of the real property described in plaintiff's complaint and which is the subject of the leasehold estate of this defendant, the co-defendants, Paul Gawzner, and all other co-defendants have not any right in or to the compensation and damages to be awarded by this Court, but the entire amount of any such award or compensation and damages in this proceeding pertaining to the said portion of the premises covered by said lease belongs solely to this answering defendant.

VI.

That this defendant has suffered damages and is entitled to just compensation from the plaintiff by reason of its condemnation, use and occupancy of the leasehold estate of this defendant, and this de-

fendant alleges that just compensation is the sum of \$150,000.00 per year for each year of occupancy by the plaintiff.

By Way of a Second Affirmative Defense Herein,
This Defendant Alleges:

I.

That at the time of the commencement of these proceedings the plaintiff elected to condemn the premises herein described for "a term of years ending June 30, 1945, extendible for yearly [124] periods thereafter during the existing national emergency at the election of the United States of America, notice of which election shall be filed in the above entitled proceedings at least thirty days prior to the end of the term hereby taken or subsequent extensions thereof."

II.

That thereupon the plaintiff went into the possession of the premises described in the complaint and has occupied and continues to occupy the same.

III.

That more than thirty days prior to the 30th day of June, 1945, to-wit, on or about May 24, 1945, the said plaintiff elected to and did extend the term of its occupancy of said premises for the additional period of one year, commencing on the 1st day of July, 1945, and expiring on the 30th day of June, 1946.

IV.

That by means of the Second Amended Complaint on file herein plaintiff is now seeking and endeavoring to terminate its use and occupancy of the said premises on November 20, 1945, and is endeavoring thereby to revoke and render ineffectual its commitment to so use and occupy said premises to June 30, 1946. That having elected to extend the said term to June 30, 1946, plaintiff is now barred and estopped from establishing a lesser term therein without paying just compensation for the full period to which it has theretofore extended such term.

Wherefore, this defendant prays judgment:

1. That it be adjudged and decreed that plaintiff has taken the use and occupancy of the premises described in the complaint for the term commencing July 10, 1944, and expiring June 30, 1946. [125]

2. That plaintiff pay to this defendant \$150,000.00 per year in monthly installments so long as plaintiff retains possession of that portion of the property sought to be condemned, which is the subject of the leasehold estate of this defendant, and to at least June 30, 1946, unless plaintiff retains possession beyond that time.

3. That it be adjudged and decreed that the co-defendants have not any right, title or claim in or to such award or compensation, except as to such portion of the premises not covered by the leasehold estate of this defendant.

4. For such other and further relief as the Court may deem proper in the premises, including costs of suit.

MacFARLANE, SCHAEFER
& HAUN,
JULIEN FRANCIS GOUX,

By /s/ RAYMOND HAUN,

Attorneys for Defendant,
Leo Lebenbaum.

[Endorsed]: Filed Nov. 6, 1945. [126]

[Title of District Court and Cause.]

STIPULATION RE PAYMENT OF PORTION
OF AWARD AND ORDER FOR PAYMENT
OF FUNDS ON DEPOSIT WITH THE
REGISTRY OF THE COURT

Whereas, a Judgment and Decree in Condemnation was made and entered in the above entitled action on November 26, 1946, reference to which Judgment is hereby made for the particulars thereof, and the plaintiff in said action has deposited in the Registry of the Court just compensation required to be paid by said Interlocutory Judgment; and [127]

Whereas, by the terms of said Judgment the Court retained jurisdiction of said proceedings to determine the amount of the interests of all parties who had appeared in said proceeding in and to the compensation, which was ordered paid by the plain-

tiff in the above entitled action, the same as though a jury had rendered a verdict for the sum of \$205,000 for all interests taken by the plaintiff in the within proceedings and for full satisfaction of all claims for damages against the United States arising from such taking, excepting that the defendant Leo Lebenbaum shall be deemed to have received upon account of any compensation found to be due him payment in the sum of \$1,672.23; and

Whereas, subsequent to November 26, 1946, there have been hearings held by the above entitled Court in reference to the determination of the interests of the defendants Leo Lebenbaum, on the one hand, and Paul Gawzner and Irene Gawzner, on the other hand, as to said award; and

Whereas, in the course of said proceedings, to wit, on March 19, 1947, it was stipulated in open Court by and between said defendants Leo Lebenbaum, on the one hand, and Paul Gawzner and Irene Gawzner, on the other hand, as follows:

“It is stipulated that the portion of the award made by the Judgment of November 26, 1946, in the within cause that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of \$91,296.00”; and

Whereas, following the making of said stipulation divers contentions were made by the said Leo Lebenbaum, on the one hand, and Paul Gawzner and Irene Gawzner, on the other hand, as to said sum of \$91,296.00; and [128]

Whereas, said Leo Lebenbaum, on the other hand, and said Paul Gawzner and Irene Gawzner, on the other hand, have settled their differences in reference to that portion of said award allocated to the restoration, repair and replacement of the property condemned, both real and personal, to wit, the sum of \$91,296.00:

Now, Therefore, It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, as follows:

1. That there may be paid out of the funds on deposit in the Registry of the Court from that portion of said Judgment allocated to the restoration, repair and replacement of the property condemned, both real and personal, by the aforesaid stipulation, to wit, out of the sum of \$91,296.00 to Leo Lebenbaum the sum of \$10,500.00.

2. That there may be paid out of the funds on deposit in the Registry of the Court from that portion of said Judgment allocated to the restoration, repair and replacement of the property condemned, both real and personal, by the aforesaid stipulation, to wit, out of the sum of \$91,296.00 to Paul Gawzner and Irene Gawzner the sum of \$80,796.00, being the balance of said sum of \$91,296.00.

3. That upon the payments out of the Registry of the Court, as hereinabove provided, the said Leo Lebenbaum, on the other hand, and the said Paul Gawzner and Irene Gawzner, on the other hand, shall waive any further contentions in the above entitled action in reference to said sum of \$91,296.00

allocated to the restoration, repair and replacement of the property condemned, both real and personal, by the aforesaid stipulation.

4. Upon the payment of the funds out of the Registry of the Court to the parties hereto, as provided by this stipulation, this stipulation shall be conclusive between the parties hereto as to their rights to that portion of the award made in the above entitled action allocated pursuant to stipulation of the parties hereto to the [129] restoration, repair and replacement of the property condemned in said action, both real and personal, to wit, to that portion of the award in the sum of \$91,296.00, but shall be without prejudice to the rights of any of the parties hereto to assert and maintain in said above entitled action any and all claims which they have heretofore advanced or may hereafter advance in said litigation in reference to the remaining portion of said total award and the payment of the funds herein referred to or the acceptance thereof under the terms and conditions of this stipulation shall not operate to estop the parties, or either of them, to assert any rights for which they have heretofore or may hereafter contend as to the remaining portion of said total award, nor shall the payment of said funds herein provided for or the acceptance thereof be construed to be a relinquishment of any of the rights asserted by any of the parties to this stipulation as to said remaining portion of said total award.

5. That the above entitled Honorable Court

shall retain jurisdiction of the above entitled proceedings to determine the amount of the interests of all parties who have appeared in the within proceedings and who may hereafter appear herein, if any, in and to the compensation ordered to be paid by the plaintiff in the above entitled cause by the Interlocutory Judgment made and entered November 26, 1946, which remains after the payment of said sum of \$91,296.00 to the parties hereto in accordance with the terms of this stipulation.

Dated this 5th day of June, 1947.

PAUL R. COTE and
THOS. H. HEARN,

By /s/ THOS. H. HEARN,

Attorneys for defendant,
Leo Lebenbaum. [130]

I expressly authorize and direct my attorneys Paul R. Cote and Thos. H. Hearn to execute the foregoing stipulation in my name and behalf.

Dated this 5th day of June, 1947.

/s/ LEO LEBENBAUM,
Defendant.

HILL, MORGAN & FARRER,
By /s/ STANLEY S. BURRILL,
Attorneys for the defendants,
Paul Gawzner and
Irene Gawzner.

We expressly authorize and direct our attorneys

Hill, Morgan & Farrer to execute the foregoing stipulation in our name and behalf.

Dated this 5th day of June, 1947.

/s/ PAUL GAWZNER,

/s/ IRENE GAWZNER,

Defendants.

ORDER

Upon reading and filing of the foregoing stipulation and good cause appearing therefor, It Is Hereby Ordered:

1. That the Clerk of the above entitled Court shall forthwith pay out of the Registry of this Court from the amounts deposited [131] in the above entitled action the sum of \$10,500.00 to the defendant Leo Lebenbaum.

2. That the Clerk of the above entitled Court shall forthwith pay out of the Registry of this Court from the amounts deposited in the above entitled action the sum of \$80,796.00 to the defendants Paul Gawzner and Irene Gawzner jointly.

3. That the sums paid out, as aforesaid, shall be received by said defendants as full compensation for the restoration, repair and replacement of the property condemned, both real and personal, in the above entitled cause.

4. That the Court shall retain jurisdiction of the within cause to determine the amount of the interests of all parties who have appeared in this proceeding and who may hereafter appear herein, if any, in and to the remaining portion of the

award, fixed by the Interlocutory Judgment and Decree in Condemnation made and entered herein on November 26, 1946, in the above entitled cause, after the payment out of the said sums hereinabove ordered to be paid.

Dated this 6 day of June, 1947.

/s/ JACOB WEINBERGER,
Judge.

Approved as to Form and Substance:

HILL, MORGAN & FARRER,
By /s/ STANLEY S. BURRILL,
Attorneys for Defendants,
Paul Gawzner and
Irene Gawzner.

PAUL R. COTI &
THOS. H. HEARN,
By /s/ THOS. H. HEARN,
Attorneys for Defendant,
Leo Lebenbaum.

/s/ IRENE GAWZNER,
/s/ PAUL GAWZNER,
/s/ LEO LEBEBAUM.

Judgment entered June 6, 1947.

Docketed June 6, 1947.

[Endorsed]: Filed June 6, 1947. [132]

[Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS

The original complaint in condemnation was filed July 10, 1944, seeking to acquire for the use of the Government, for a term of years, certain property located in the County of Santa Barbara, State of California. The premises consist of approximately twenty-one acres of land, the same being bounded on the North by U. S. Highway 101 and on the South by beach frontage on the Pacific Ocean. As of the date of filing of the complaint, the property was, and now is, owned by defendants Gawzner in fee, and defendant Leo Lebenbaum was, and is, the lessee of a portion of the premises containing hotel buildings and 250 feet of beach frontage, and furniture and furnishings, hotel equipment and other personal property on and in said premises. The land not under lease was reserved to the use of defendants Gawzner, and was, and is, improved by a garage building.

The issues involved herein have been of a complicated nature since the inception of the proceedings; many delays have occurred during the progress of the case [133] the first ensuing a year and a half after the filing of the complaint, upon the death of the learned Judge to whom the action was first assigned. Shortly thereafter the matter came to this department of the court, both lessor and lessee having filed substitutions of attorneys. This case has been given the attention, at different periods, of

several Special Assistants to the Attorney General and several Assistant United States Attorneys for this District. The original complaint has been amended, the third and last amended complaint having been filed the latter part of 1946. Setting dates for trial on the merits have been vacated for various reasons, the most predominant of which have been the likelihood of a compromise of some issue or phase of the matter; at one time a jury was impaneled, only to be excused a month later; the final brief was filed and the case was submitted for decision in April of this year.

It is a source of regret to this court that an earlier decision has not been forthcoming; we are dictating these comments during the vacation period and after being continuously engaged for the past three months in the jury trial of a criminal matter. The pressure of official matters has prevented the rendition of our opinion prior to this date.

The lease between the defendants is dated December 15, 1943, and covers a period of five years from date, with option for renewal for an additional five years. Under the lease, the premises are to be used only for the purpose of carrying on the business of a hotel, and other activities usually attendant upon hotel operations; the rent is fixed at 35% of the gross business from rental of [134] cottages, rooms, etc.; 15% of the gross business from sale of liquors, etc.; 5% of the gross business from the sale of food, with a guaranteed minimum rental of \$1500 per month. In Paragraph Five of

said lease, the lessors covenant to keep the roof, foundations, structural supports and outer walls of all buildings in good order and repair and properly painted, all other costs of upkeep, repair, replacement of the leased property including the care of lawns, shrubbery, etc., being the obligations of the lessee; by the provisions of the lease, the lessee is to deposit \$20,000 in a bank, which fund is to be drawn upon by the parties for the purpose of making permanent improvements, which improvements are to become the property of the lessor. By Paragraph Seven of said lease, lessee is required to deposit monthly a sum equal to 3% of the gross business from rental of cottages, rooms, etc., and from the sale of liquors, etc., which fund is to be used for the replacement of furnishings, furniture and all personal property covered by the lease, provided the lessee is not required to deposit more than \$3,000 per year in such fund. It is further stated in said last mentioned paragraph that it is the intention of the parties that said lessee shall maintain all of the furniture, etc., in the same condition as at the commencement of the term, and to that end, as any of said personal property shall, by use or otherwise be rendered unrepairable, the same shall be replaced from said fund so created, to the end that, upon the termination of the lease, said lessors shall receive back furniture, etc., of as good character and value as the same is at the commencement of this lease.

Paragraph Ten of the said lease contains certain provisions for termination of the lease upon the

happening of condemnation proceedings of the sort described in said paragraph. Paragraph Twelve of said lease contains a covenant against sub-letting, Paragraph Thirteen contains the lessee's covenant that he will surrender the premises at the termination of the lease or renewal thereof in as good order and condition as the same were in at the commencement of the term, reasonable use and wear thereof and damage by the elements excepted.

By the complaint filed July 10, 1944, the United States sought to take an estate in the premises described therein for a term of years ending June 30, 1945, extendible for yearly periods thereafter during the existing national emergency, at the election of the United States of America, together with the right to remove within a reasonable time after the expiration of the term or extensions thereof, any and all improvements and structures placed thereon by the United States. The use stated in said complaint was that of a redistribution station and related military purposes.

Defendants Gawzner filed answer alleging that by virtue of the provisions of Paragraph Ten of the said lease the condemnation proceedings had worked a termination of the lease and that the entire amount of any award in such proceedings should be given to said defendants Gawzner, and further alleging the rental value of the premises sought to be condemned and covered by the lease to be \$150,000 annually, and the rental value of the premises sought to be condemned and not covered

by the lease to be \$10,000 annually, further alleging the highest and best use of the property to be for hotel purposes. [136]

Defendant Lebenbaum filed answer alleging that the entire award for the use of the property covered by lease should be paid to him, further alleging the value of such occupancy, together with compensation for damages occasioned by the use to be made to be \$150,000 annually, and denying that the condemnation proceedings had worked a termination of the lease.

Pre-trial hearings were set, and by stipulation an amended complaint was filed, the answers on file being deemed the answers to the amended complaint; certain sums were deposited in the registry of the court by the United States, and by stipulation taxes against the property involved for the fiscal year 1944-1945, amounting to \$1,594.02 were paid from said fund, said sum to be credited against the amount of the ultimate award decreed payable to defendants Gawzner.

Pre-trial briefs were filed in April of 1945 and in the brief filed by the then counsel for defendants Gawzner, it was first argued that the lease had been terminated as alleged in the answer of said defendants; it was further pointed out in said brief that the covenants in the lease demonstrate that the lease is not a lease in the accepted sense of being an absolute conveyance of real property wherein the owner retains only the reversion, but is more in the nature of a personal service contract or a license to use the premises and personal prop-

erty upon payment of the percentages and the performance of other conditions; that the factual situation created a complex problem to fix the method of valuation and a definition of value which would result in just compensation; it was further agreed in said brief that the value of the interests [137] of the owner and tenant should be separately fixed, but if the general rule of fixing but one value should be adopted, and upon the assumption that the tenant is entitled to share in the award, the definition of just compensation would be the highest price estimated in terms of money for the immediate use of the premises, furniture, fixtures and equipment, free of existing leases, for its highest and best use, if exposed for lease in the open market by an owner who is willing but not forced to lease, a reasonable time being allowed in which to find a tenant who is willing but not forced to rent, either acting under compulsion but each acting with full knowledge of all the elements affecting the value of the use of said property and for all the uses and purposes for which the property is adapted and of which it is capable, the tenant to keep the property in good repair, reasonable wear and tear excepted, the owner to keep the exterior in good repair, the owner to pay the amount reasonably required to procure from the existing tenant the immediate termination of the lease; that the use which was to be made of the property should be taken into consideration.

Counsel further stated in said brief that it was

the intention of defendants Gawzner to present experts on the question of value, upon the definition thereof ultimately adopted by the court, and to interrogate the witnesses on direct examination on the basis of their valuation. "It is anticipated," stated counsel, "that this line of questioning will result in the witnesses testifying that they gave consideration to the earnings of the property at and near the date of taking, and that, after investigation, they formed opinions of the earning [138] capacity of the property during the term of the use condemned. It is then proposed to develop in detail the figures. These statistics and opinions of anticipated earnings during the term condemned will not be introduced as in themselves fixing the valuation to be placed upon the use condemned in this proceeding but only to show on what basis and upon what evidence the experts relied in forming their ultimate valuation opinion. (Citing Brooklyn Eastern District Terminal v. City of New York, 139 F. 2d 1007, Monongahela Navigation Co. v. U. S., 148 U. S. 312, and James Poultry Company v. Nebraska, 284 N. W. 273.)

We are unable to locate in the voluminous files of this case any brief filed by the Government in April of 1945 which sets forth the Government's position as to the definition of value, but we presume this position was stated, either in open court or in some other manner, for we find, on page 1 in a brief filed by defendants Gawzner April 19, 1945, the following:

"The definition of value proposed by the govern-

ment in the case at bar, by which it is proposed to fix the entire compensation the government can be compelled to pay in this case is as follows:

“ ‘By rental value is meant, . . . the highest price estimated in terms of money which the property would bring if exposed for lease in the open market by an owner who was willing but not forced to lease the said premises, a reasonable [139] time being allowed to find a tenant who was willing but not forced to rent the premises, and with both lessor and lessee acting with full knowledge of all the uses and purposes for which the property is adapted and of which it is capable.’ ”

In the brief filed by defendant Lebenbaum his then counsel argued that the lease had not been terminated, that the lessor was not entitled to any compensation for the use of the leased premises. In said brief counsel conceded the weight of authority to be that the taking of a portion of a leasehold interest does not absolve the tenant from his covenant to pay rent, and that the tenant remains liable for the full amount, notwithstanding the condemnation of a portion of the property for public use. Counsel observed in said brief, however, that since the rental under the lease provides for a percentage of gross receipts of the lessee “it may be that the Court in a final decision . . . and after the determination of the total rental to be paid by the Government will be required to apportion that sum between the lessors and the lessee under a formula which *which* express the sum to be paid by the Government in terms of anticipated gross re-

ceipts by the lessee and divide the award equitably, bearing in mind that the evidence will show that the operation of the premises by the lessee under the schedule of percentage rental fixed in the lease results in a profit to the lessee over and above the rents paid to the lessors." [140]

In June of 1945, the defendants jointly moved to strike the portion of the second amended complaint which provided that the condemnation sought should include the right to remove improvements placed thereon by the United States within a reasonable time after the expiration of the terms or extensions thereof, on the ground that the Government is without power to condemn the use of property for the purpose of removing improvements after the end of the specific term condemned. Thereafter on Sept. 19, 1945 a stipulation was filed wherein it was agreed between the plaintiff and all the defendants that any judgment entered in the proceedings should provide that the plaintiff should remove all improvements placed by it upon the property, and that the plaintiff should restore the property condemned, both real and personal, to the same condition as that in which it was received by the plaintiff from the defendants, reasonable and ordinary wear and tear excepted, and that such removal, and restoration should be accomplished by the plaintiff during the term of the use taken, or within a reasonable time after the expiration of such term, and that the plaintiff should be permitted to remain in possession after such expiration for such reasonable time, provided the plaintiff should be re-

quired to pay to the parties legally entitled thereto rental at the rate fixed by the court in the above entitled action for the period of time after the expiration of such term as the plaintiff should remain in possession of the condemned property for the purpose of such removal or restoration.

On June 30, 1945, Judge Hollzer ruled upon the issue tendered by the answers of defendants Gawzner and Lebenbaum concerning termination of the lease, and decided [141] that said lease had not been terminated by reason of the condemnation proceedings herein and Paragraph Ten of said lease. Also in his opinion filed on said date, (reported at 61 F.S. 268), it was stated, in part:

“That is to say, so far as it presently disclosed, it is a part of the lessee’s ownership of such estate which the sovereign is taking. While it may be that the evidence to be introduced at the trial will prove that the sovereign is also destroying or taking some of the rights of the owner of the fee, it is clear that upon the face of the pleadings the government is here seeking to substitute itself as occupant of the demised premises in place of the owner of the right of such occupancy. The owner of such right being the lessee, it is the latter ‘who must be put in as good position pecuniarily as if his property had not been taken,’ and this is to be done by paying to him the value of the interest taken.”

In October of 1945 defendant Lebenbaum filed a motion to dismiss the proceedings as to defendants Gawzner on the ground that such defendants were

not entitled to participate in the condemnation trial, which motion was opposed by defendants Gawzner.

Also in October, the United States moved to file a second [142] amended complaint on the ground that the Secretary of War of the United States had determined that the use and occupancy of the premises beyond November 20, 1945 was unnecessary, and that such determination should be set forth in a second amended complaint. The Court allowed the filing of said complaint without prejudice to defendants' moving to strike the same. Defendant Lebenbaum answered said second amended complaint, and after setting forth matters similar to those in his answer previously filed, alleged that plaintiff having elected to extend its term to June 30, 1946 was barred and estopped from establishing a lesser term without payment of full compensation for the full period to which it had theretofore extended such term.

Defendants Gawzner moved to strike the second amended complaint based upon the ground of estoppel. On November 19, 1945, a stipulation was entered into between plaintiff and defendants which stipulation was headed: "Stipulation fixing terms and conditions for denial of motion to strike second amended complaint and order thereon." By said stipulation it was provided that the terms of the use and occupancy of the premises should be from the date of taking possession of the property, July 10, 1944, to and including November 20, 1945. That it was contemplated that plaintiff would be ob-

liged to retain possession of said property beyond November 20, 1945 for the purpose of estimating the cost of and restoring said property to its condition at the date when the plaintiff entered into possession, ordinary wear and tear excepted, and that the parties estimated the time needed for such purpose would extend to February 20, 1946, or to a later date.

That just compensation to the parties entitled thereto [143] should include payment at the same rate for the additional period between November 20, 1945 and February 20, 1946, irrespective of when the plaintiff should surrender possession, and should possession not be surrendered by February 20, 1946, rental at the same rate should be paid for the period following February 20, 1946 to the date when possession was surrendered. In consideration of such agreement, defendants agreed that they would accept and receive possession of said premises when tendered by plaintiff to them as completely restored, not waiving, however, any right defendants might have to claim such restoration was not complete.

That said stipulation further provided that should the parties subsequently agree upon a cash sum to be paid by plaintiff to the parties entitled thereto in lieu of restoration, and the parties should agree upon the length of time required for restoration, and such period extended beyond Feb. 20, 1946, then just compensation to the parties entitled thereto should include rental beyond February 20, 1946 for the full length of such estimated period at

the same rate as that fixed by the final judgment, computed on a monthly basis.

Defendants Gawzner then filed their answer to the second amended complaint, alleging much of the same matters as those contained in their previous answer, and stating that defendant Lebenbaum had not paid any rent, since the commencement of this action; alleging further that the premises had become permanently depreciated and damaged, and that the reasonable value of the use and occupation of the property, together with just compensation for the restoration thereof to its condition at the date of [144] taking, and for the permanent depreciation thereof was in excess of the sum of \$200,000.

In December of 1946 defendant Lebenbaum filed a motion to exclude defendants Gawzner from participation in the proceedings, a motion for an order directing the plaintiff to deliver possession to defendant Lebenbaum upon the termination of its occupancy of said premises, and a motion for an order releasing from the funds theretofore deposited in the registry of the court a sum of money equal to the minimum rental payments due the defendants Gawzner under the terms of the lease, and for an order releasing from said deposited funds the sum of \$15,000 payable to defendant Lebenbaum to be used in reopening the hotel.

Defendants Gawzner opposed the first two motions, and opposed the release of any funds to defendant Lebenbaum for use in reopening the hotel, all such opposition being upon the ground that the

lease had been terminated by the condemnation proceedings as contemplated in Paragraph Ten of said lease, and further that should the lease not be terminated, the right of Lebenbaum to share in the award could be determined only by evidence taken at a trial.

The case was, on March 20, 1946 assigned to this department and briefs were ordered filed concerning motions then pending.

In the brief filed by the United States, it was urged that if the lease was terminated, defendant Lebenbaum could not be heard on the issue of compensation at a trial of the matter; that if this court should adhere to the decision of Judge Hollzer that the lease had not been terminated, then defendant Lebenbaum, only, should be [145] heard on the issue of compensation for use of the leased premises, and the Government should be free to negotiate with him, if possible. It was also urged in the brief filed by the Government that the Court must decide which defendant would be entitled to the money for restoration of the premises, and that if the lease remained in effect, such restoration fund would be payable to the tenant.

Arguments were heard on these motions, and the matter was submitted for decision.

The matter had been set for June 5, 1946 for trial, and on April 5, 1946, a stipulation was entered into by the parties, wherein reference was had to a previous stipulation made in open court, and agreeing in effect that if the Court should adjudge that interest should be payable to the parties en-

titled to compensation for the use of the premises, no interest should be allowed on the monies on deposit in the registry of the court for the period commencing April 23, 1946 and ending with the date of rendition of judgment by the Court.

On April 30, 1946, this Court made its order denying the motion to exclude defendants Gawzner from the proceedings, and granting the motion of defendant Lebenbaum for an order that surrender of possession of the premises covered by the lease when made by the United States, should be made to defendant Lebenbaum, and denying the motion of defendant Lebenbaum to release funds on deposit, except that such motion was granted to the extent agreed upon by the parties in open court. In a Memorandum of Conclusions accompanying such order, we stated that we found no change from the facts considered by Judge Hollzer when he ruled that the lease was in effect notwithstanding the condemnation [146] proceedings, and in said memorandum we concluded that Paragraph Ten of the lease does not refer to condemnation proceedings such as are involved herein, and that the lease has not been affected by such proceedings, and that the Government should therefore tender possession of the premises to the lessee upon the conclusion of its occupancy.

On May 31, 1946, the parties entered into a stipulation wherein it was mentioned that the defendants had requested that the trial date of June 5, 1946 be vacated and that as a condition to the granting of such request had consented to waive

interest upon the monies heretofore deposited in the Registry of the Court for the period commencing June 5, 1946 and ending with the date of the commencement of actual trial.

On May 29, 1946, a stipulation was entered into between Lebenbaum as the only stipulating defendant, and the United States as plaintiff, wherein reference was made to the order of the court directing surrender of possession to the lessee upon conclusion of its occupancy of the leased premises. Such stipulation recited the tender by the Government, and the acceptance by the defendant Lebenbaum of all improvements, furniture, fixtures, etc., heretofore taken by the plaintiff except to the extent that restoration or replacement should be required by judgment herein; that the date of such tender and acceptance was 11:59 p.m. on May 31, 1946, and that the acceptance of such possession was without prejudice to the right of defendant Leo Lebenbaum to claim, establish, enforce and receive full compensation for the obligation of the United States to restore said premises and other property to its condition at the [147] time when plaintiff entered into possession, ordinary wear and tear excepted, and such compensation should include a sum equivalent to the rental which shall be finally fixed for the base period between July

10, 1944 and November 20, 1945, computed on a monthly basis, for an additional two (2) months period next following June 1, 1946, which additional sum should be paid as a part of the compensation for the restoration of the premises.

On June 10, 1946, a stipulation was entered into between the Gawznern as the only stipulating defendants, and the Government, wherein possession of the premises not covered by the lease was tendered to and accepted by, defendants Gawzner, except to the extent that restoration and or replacement might be required by judgment herein; that the acceptance of possession was without prejudice to the right of the defendants Gawzner "to claim, establish, enforce and receive full compensation for the obligation of the United States to restore said premises and other property to its condition at the time when plaintiff entered possession, ordinary wear and tear excepted, and shall include a sum equivalent to the rental which shall be finally fixed in this proceeding for the base period between July 10, 1944 and November 20, 1945, computed on a monthly basis, for an additional period next following the date of termination of tenancy equivalent to the time which shall subsequently be agreed upon or finally fixed and determined in this proceeding as the reasonable period necessarily required for such restoration."

The Court ordered the filing of pre-trial briefs. All parties by June of 1946 were appearing by different counsel than at the inception of the proceedings. [148]

In addition to filing numerous pre-trial briefs at the request of the Court, pre-trial proceedings which occupied approximately twelve days in open court were had, on various days during the period beginning June 18, 1946 and ending October 29, 1946.

The Government in its pre-trial brief filed June 18, 1946 took the position as far as the leased premises were concerned, that nothing had been taken from defendants Gawzner, and said defendants were not entitled to participate in the jury trial to fix the award for the use of those premises, and that the provisions of the lease calling for a percentage rental had no bearing upon this phase of the case. That defendants Gawzner likewise had no standing toward fixing the cost of restoration of the leased premises for the reason that the obligation of the tenant to restore did not mature until the end of the term. That the amount of compensation to be paid to defendant Lebenbaum consisted of (a) the market rental value of a sublease under Lebenbaum for a period commencing July 10, 1944 and ending May 31, 1946, and (b) the reasonable cost of restoration of any damage to the leased premises over and above reasonable wear and tear, together with sixty days' equivalent of rental, pursuant to the stipulation entered into between the Government and Lebenbaum.

That as to the portions not under lease the defendants Gawzner were entitled to compensation therefor, and Lebenbaum had no right to be heard concerning such compensation; that the measure

of such compensation would be the market rental value thereof for the term, together with reasonable cost of restoration if any portion of such property was damaged by the Government's use. [149]

Defendant Lebenbaum, in his brief filed June 18, 1946 reiterated his position that as to the leased premises defendants Gawzner had only the right to collect rent from Lebenbaum or terminate the lease, and that such right had not been changed by the condemnation proceedings; that the defendants Gawzner, having lost nothing by the temporary taking of the hotel property, are entitled to no award in these proceedings; that their rights rest in the personal covenant of defendant Lebenbaum to pay rent for the leased premises, which covenant remained in full force and effect throughout the occupancy by the Government. That under the lease the burden to repair all dilapidations of personal property covered by the lease as well as the interior of the buildings, and that Lebenbaum should be entitled to the award which would enable him to repair the dilapidations which occurred during the Government's occupation; that with reference to such burden, the remedy of defendants Gawner rests in their contractual rights against Lebenbaum which may be enforced against him if he should fail to discharge his duty.

In the brief of defendants Gawner filed June 28, 1946, counsel reiterated the contention of such defendants that the lease had been terminated. He stated that the landlord was entitled to participate in the proceedings fixing the compensation for the

use of the leased premises for the reasons that the lease fixed the rent to be paid on a percentage of gross business done, provided that the premises should be continuously used by the lessee only for the purpose of carrying on the business of a hotel, etc.; that the lease further provided that the furniture and furnishings should be maintained in good condition; by [150] virtue of the provisions just mentioned, the landlord's rental would be directly dependent upon the amount of business done, which in turn would depend upon the condition of the premises; that the Government not only occupied the premises, but in addition thereto eliminated any right of the tenant or any other person to operate a hotel in the premises and further the Government damaged the furniture and furnishings to some amount in excess of usual ordinary wear and tear.

Counsel for defendants Gawzner further agreed that this Court has the exclusive jurisdiction to determine the interests of all defendants in the award, and to try out the conflicting claims of the parties.

Counsel for Gawznors then observed, in said briefs, that the tenant's right to recover would be based upon the so-called "bonus value" theory, i.e., what would a purchaser in the open market have paid to the defendant Lebenbaum in dollars for the right to take over the lease during the period of the Government's occupancy and continue to pay to the landlord all of the rent reserved by the lease.

During July of 1946 the Court viewed the premises involved. Thereafter counsel were directed to exchange information with reference to restoration costs. At a hearing on September 9, 1946, counsel for the Government reported that he had received copies of restoration costs as estimated by defendants Gawzner, and an estimate by defendants Lebenbaum, and that such estimates were widely divergent. Counsel for the Government stated that defendants Gawzner took the position that restoration covering inherent depreciation and normal use should be made, in addition to [151] the payment of rent; that it was the position of the Government that any rental paid should include payment for ordinary wear and tear, and restoration costs should be only those for use resulting in more than ordinary wear and tear. Counsel for defendants Gawzner agreed in the statement of counsel for the Government as to the respective positions taken, and mentioned that certain repairs to the exterior would have to be made; that the appraiser engaged by the lessor was not instructed to allow for ordinary wear and tear, but to ascertain the damage done and the cost of rehabilitation. It was suggested by counsel that it would be difficult to ascertain the condition of the personal property at the date of entry by the Government so that the cost of restoring it to the condition to which it should be found after ordinary wear and tear had ensued could be estimated. Counsel for defendants Gawzner then pointed out that under the terms of the lease the equipment was to be

maintained in the same condition in which it was when the lessee took over. Counsel for the Government then stated that the Government did not undertake such an obligation, to which counsel for defendants Gawzner observed that if the Government paid only a portion of the cost of restoration, a complication in the apportionment between the tenant and the landlord would result.

Counsel for Mr. Lebenbaum stated that the lessee had been unable to arrive at a reliable figure because market prices had increased and materials were difficult to obtain. That the lessee took the position that the only manner in which the difficulty could be solved would be to proceed with the restoration, and thus ascertain what it would cost. That the problem was then presented as to [152] what portion of the cost of each article should be borne by the Government.

Counsel for the lessee conceded that the Government was correct in its position that ordinary wear and tear should be included in the rent, then mentioned that under the lease Mr. Lebenbaum is obligated to repair ordinary wear and tear, so that the obligation of the lessee to the landlord is rent, plus restoration, plus any other dilapidation.

Counsel for the lessee further stated that in his opinion the question should be submitted to the jury on the basis of what is the rental value to a tenant who has not the burden of restoring ordinary wear and tear.

Counsel for the lessor stated that in his opinion

the easiest method would be to agree upon a restoration cost and exclude from the issue going to the jury any ordinary wear and tear, and submit to the jury the question of a flat rental, with the understanding that the Government has restored.

Counsel for the Government conceded that the property was put to a greater use than ordinary use, and suggested that the matter be continued, and that the parties would endeavor to come to some agreement concerning what the restoration cost would be to a tenant using the property for hotel purposes, and occasioning ordinary wear and tear. He then added that some of the damage had been occasioned by the refusal of the landlord to approve repairs and the issue would arise as to whether or not the Government was responsible for damage caused by the failure of the landlord to repair or to approve the making of repairs by the tenant. [153]

Counsel for the lessee then questioned whether the refusal of the landlord to make exterior repairs relieved the Government from the obligation to pay the lessee for damage occasioned to the interior by such need for exterior repairs.

The Court then requested that counsel disclose to each other the evidence they intended to offer at the trial, so that each could determine the objections he intended to offer, if any, to such evidence, to the end that if possible, the legal questions might be argued prior to calling the jury.

Here we shall review some of the points advanced by the Government in its brief on legal issues to

be tried filed September 27, 1946, and which the Government tendered as applicable to that portion of the trial in which the Government's obligation would be determined:

1. Compensation may be fixed only on the basis of the reasonable rental value of a single term of $25\frac{2}{3}$ months for the letting of the entire premises with the exclusive right to use and occupy such premises and the furniture and fixtures therein, having regard for the uses for which they were then available, and for which there was a market, actual or potential, on July 10, 1944, including the highest and best marketable use, as such rental would have been fixed on that date in negotiations between a willing lessee and sublessee.

2. Consideration of the use to which the property was actually put should be excluded, as same was a non-marketable use.

3. Witnesses must testify separately as to compensation for rent and as to damages for restoration. [154]

4. The compensation provisions of the lease are not relevant to prove the cash rental value of the Government's use and occupancy.

5. The contingent percentage terms of the lease may not be brought out on the direct or cross-examination of any witness.

6. The net profit or loss received or sustained by the lessor or lessee during the operation of the property before it was delivered to the Government is not relevant.

7. No stipulations of the parties, or any other

action of the Government have extended or increased the obligation of the United States to pay damages for restoration over and above what would otherwise be its legal obligation under the Fifth Amendment.

8. The United States has no greater or different obligation to pay restoration damages than would have been the obligation of a private individual who had leased the furnished hotel for a $25\frac{2}{3}$ month period without any express covenant as to restoration.

In a joint brief filed by all defendants on October 8, 1946, the defendants contended that the Government was obligated to do actual restoration of the property under its stipulations and having failed to restore the property, defendants were entitled to damages for such breach of contract to the present full cost of such restoration;

That because the second amended complaint sought to condemn a use for a period from July 10, 1944 to November 20, 1945, no evidence of a use for a longer period could be submitted to the jury; [155]

That compensation to be recovered by the defendants should be the reasonable value of the use of the premises for all purposes reasonable foreseeable under the uses for which the premises were sought, i.e., the establishment of a redistribution station related to military purposes;

That evidence of the actual revenue of the property involved before and after taking of the rights condemned by the Government should be admis-

sible; also the cost of operation and maintenance of the property; the value of the improvements damaged or destroyed by the Government; the opinion of experts as to the market value of the temporary use, i.e., for a redistribution station and related military purposes; the reasonably foreseeable consequences to the property resulting from its use by the Government for a redistribution station and related military purposes as sought by the Second Amended Complaint; that the terms of the lease should be admitted in evidence both to show the interests of the parties and for all purposes.

At a pre-trial hearing on October 14, 1946, counsel for all defendants conceded that the United States had exercised its option to try the case as against all defendants, under the provisions of Section 1246.1 of the Code of Civil Procedure of the State of California, and that counsel for defendants Gawzner stated it was his understanding of the law that the defendants must join and submit the total value of all their interests to the jury as a unit; counsel for the United States agreed and stated that the jury, during the trial, should not have brought before it the conflicting positions taken by the defendants as to their separate interests; counsel for [156] defendant Lebenbaum stated it was his understanding that the two defendants would join as to the just compensation to be awarded to them as a group, that any question of allocation of the award as between them should not arise before the jury; that, after that

should be determined, the Court, without a jury, would determine the allocation or division as between the Gawzners and defendant Lebenbaum; counsel further urged that this Court had no jurisdiction, in any proceeding, to determine the question of rent as between the defendants.

It was also stipulated at said pre-trial hearing that the period to be referred to at the trial as that for which valuation would be fixed, should be the period from July 10, 1944 to November 20, 1945, as described in the second amended complaint.

On October 17, 1946, there was presented by counsel the question as to whether the Government had the legal right to condemn personal property for a temporary use; further argument also occurred as to whether the United States was bound by the stipulation signed by its counsel and counsel for the defendants September 9, 1945 and November 19, 1945, as those stipulations refer to restoration; counsel for the Government contended that if those stipulations purported to agree that the Government would pay higher compensation in the form of restoration than that demanded by the Fifth Amendment, the United States was not bound.

Counsel for defendants Gawzner stated his position with reference to the matter was that defendants were entitled to treat the compensation that the Government must pay on the basis of what the rental would be by the [157] long-term tenant against the short-term occupier; that the terms of

the lease were material and pertinent for the reason that under the terms of the lease the premises must be maintained by Mr. Lebenbaum, and Mr. Lebenbaum would have kept such obligation in mind when negotiating for the lease for a short term out of his long-term lease and fix his rent accordingly.

Counsel for defendants then observed that unless the stipulations were set aside, defendants would not raise an objection concerning the right of the Government to condemn the temporary use of the personal property.

Counsel for the United States observed that the attorney who signed the stipulation on behalf of the Government had only the authority given the Government under the Fifth Amendment.

Counsel for defendant Lebenbaum stated that the obligation of the Government under the Fifth Amendment would be to pay to the condemnee the difference in value between the property as it was at the time of the taking and as it was at the time of the return that the obligation of the Government under the stipulations was to do the actual work of restoration. That the obligation to do the actual work of restoration, imposes upon the Government a different type of obligation than the obligation to pay for the restoration; a different type of procedure, and a different measure of recovery for the defendants.

Counsel for defendant Lebenbaum then proposed that the matter be submitted to the jury under

instructions that the rent should not include ordinary wear and tear, but the recovery for restoration should include ordinary wear and tear. [158]

Counsel for the Government stated that he could not accept that statement for the reason that he could not conceive how expert evidence could be introduced concerning furnished property without the rent including ordinary wear and tear; that the Government had continued in possession endeavoring to determine what would be required for restoration, when defendant lessee petitioned the Court that the Government is divested of possession, and such possession returned to him; that possession had been returned to the lessee, and that both the lessee and the lessor had started the work of restoration; that upon being tendered possession, and under such circumstance, defendant lessee modified his previous statement, and reserved the right to claim in damages the equivalent of the cost of restoration.

Counsel for defendants Gawzner stated that if the Government could not be bound by the stipulations entered into by its counsel concerning restoration, such counsel would be obliged to revise his theory as to offering proof of rental value of the property as a hotel, and that the evidence would then be offered on the basis of consideration of the actual use.

A discussion ensued as to whether defendants Gawzner would be bound by the stipulation made by the Government and defendant Lebenbaum providing that two months should be the period of

restoration; counsel for the Government stated that it was his understanding that at the trial the Court would direct that in addition to the rental as fixed and in addition to restoration as fixed, there would be included an additional sum for the period running from November 20, 1945 to June 1, 1946, [159] at the same monthly rental.

In a brief filed October 18, 1946, counsel for the United States reiterated in writing certain concessions made in open court with reference to the admission of evidence at the trial, and in effect stated that while in his opinion the general rule is in condemnation cases that if there is a market, evidence in respect to profits and factors out of which profits are derived is not admissible, but that due to the peculiar circumstances of the present case wherein it appears that such market evidence as is available is derived out of transactions involving this particular property and other leases upon the basis of sharing the profits of the operations of the hotels and, in view of the fact that the defendants were willing that such factors be received in evidence, the Government would not object to such being made the rule in this particular case, provided such evidence would cover a business cycle of not less than five years.

On October 18, 1946, at a further pre-trial hearing, counsel for the Government announced that the Government would be bound by the stipulations its counsel had signed; counsel for defendants Gawzner inquired when the Government intended to do the restoration it had agreed upon, to which

counsel for the Government replied that it was his view that the stipulation entered into between the Government and the lessee relieved the Government of performing the actual restoration, and that there remained instead the liability to pay for the equivalent of restoration; counsel for defendants Gawzner then pointed out that defendants Gawzner had not joined, and had not been asked to join in the stipulation, that such stipulation provided for two months [160] as the period for restoration, and equivalent rental therefor, whereas the defendants Gawzner had entered into a stipulation with the Government wherein three months was designated for the period of restoration, and equivalent rental therefor. Counsel for defendants Gawzner then announced that he would be bound by the stipulation providing for the two months period during the trial before the jury, but that he would not be bound by such stipulation when the Court proceeded to divide the award. Whereupon, counsel for defendants Gawzner stipulated with counsel for defendant Lebenbaum that as against the Government defendants Gawzner would be bound by the stipulation that two months rent might be paid as considered to be for the time required for restoration, and that defendants Gawzner would not be bound by such stipulation as against defendant Lebenbaum.

The question then arose as to whether the jury would be asked to fix the rent for the period stated in the second amended complaint, to-wit: from July 10, 1944 to November 20, 1945, and the Court should add to the judgment an additional two months rent at a monthly rate to be computed, or whether the jury should make such computation. Counsel for defendants Gawzner observed that if the jury were to make the compensation, the complaint should be amended to include the two months period, whereupon counsel for the Government stated that he would endeavor to secure permission to amend the complaint accordingly.

The Court then stated that it was of the opinion that the Court should know for its own information what part of the award would be considered as restoration and what part as rent. Counsel for the Government pointed out [161] that the fixing of damages for restoration should cover only the period up to the time the Government actually turned the property back; that in such regard the jury should be told that the jury should not consider the fact that the Government was paying rent for a longer period than it occupied the premises.

The Court then requested that all counsel submit by October 21, 1946, questions proposed to be asked of the experts as to rental value and on the questions of restoration. All counsel demurred to the request, stating they would be unable to formulate such questions in advance; counsel for defendants insisted they intended to ask the experts to take into consideration the terms of the lease in con-

sidering what a long-term tenant would charge a short-term occupier; counsel for the Government replied that he considered the lease not to be a measure of the award, as such, and thus not admissible.

At the close of the pre-trial hearing held on October 14, 1946, counsel for the Government and counsel for defendants Gawzner were in agreement upon the following statement of counsel for defendants Gawzner:

“As I understand it, the Government in giving testimony as to restoration is to go in upon the theory that all damage that was done over and above what would have been done for hotel purposes will go in under restoration and that the value of the use will go in under the theory that it was to be used for hotel purposes.” [162]

Counsel for defendant Lebenbaum stated that he agreed, except that the evidence bearing on the question of restoration, in view of the obligation of the Government as set forth in the stipulation should be given on the basis of the cost at the date of trial of making restoration and not on the basis of the difference in value of the furniture at the time it was taken and the time it was returned.

On Monday, October 21, 1946, counsel for the Government, at a further pre-trial hearing announced that he intended to ask leave to amend the second amended complaint to change the term of occupancy from that fixed in said complaint, to-wit: July 10, 1944 to November 20, 1945, to a term the

equivalent of the Government's actual occupancy, from July 10, 1944 to June 1, 1946. Counsel for all defendants announced their objections to such amendment; counsel for defendants Gawzner pointed out that the operation of a hotel of the type involved is more or less seasonal; that the inclusion of the period from November 20, 1945 to June 1, 1946 in the term of occupancy would change the presentation of evidence, for the reason that defendant Lebenbaum would ask a different figure of rental for a lease that would be for one winter and two summer months, than he would for a lease for two full years. That though the Government did remain in possession for the period indicated, it had agreed or indicated it would vacate in November and it would have been more advantageous to the property owner to have the premises returned in the winter than in the summer.

Counsel for the Government then moved to file his third amended complaint; counsel for defendants objected [163] on the ground that the Government was concluded by its stipulation of November 19, 1945 fixing the term of occupancy as from July 10, 1944 to November 20, 1945.

It was then agreed between counsel for defendants that during the trial before the jury when either spoke, he would speak for both defendants unless he otherwise indicated.

On October 21, 1946, pursuant to order of court, the Government's third amended complaint was filed.

On October 23, 1946, a jury was impaneled, and temporarily excused while counsel continued further discussion. It was agreed that the term of occupancy for which the premises were condemned would be designated as $23\frac{2}{3}$ months, and that the two months restoration period would be excluded from the term, and when the rental would be finally fixed, a monthly rate would be computed, and twice the monthly rate would be added to the award for restoration.

The Court then asked counsel for defendants regarding whether its previous understanding was correct, to-wit: that one counsel when making an objection or stipulation would speak for all defendants during the trial before the jury, whereupon counsel for defendant Lebenbaum stated that there would be matters on which the defendants would be in opposition during the trial, evidence to which defendants Gawzner might not offer objection and to which defendant Lebenbaum's counsel might wish to object on behalf of such defendant and vice versa; counsel for defendants Gawzner signified his agreement with such statement and added that in view of a conference just had in chambers, he felt that counsel for defendants [164] would be very much at odds, and that defendants Gawzner refused to be concluded by any stipulation made by Mr. Lebenbaum concerning restoration. (At the conference referred to, Government counsel had disclosed to the Court, for the first time, that such counsel contended that defendant Leben-

baum had entered into a series of contracts on February 12, 1946 with the Government whereby said defendant had fixed, item by item, what he consented would be restoration.)

In the ensuing discussion in open court, Government counsel contended that at the trial defendant Lebenbaum would be limited to his stipulations with the Government as to damages for restoration; said counsel also stated that he understood that counsel for defendants had agreed to a joint presentation of the evidence, but that under the circumstances, if a joint presentation were not to be made, the Government would request that the Court determine what compensable interests were taken from defendants Gawzner, and what compensable interests were taken from defendant Lebenbaum.

Counsel for defendants Gawzner then observed that defendant Lebenbaum by stipulation had sought to deprive defendants Gawzner of certain of their rights; that defendants Gawzner had made a stipulation with the Government that the latter would restore the premises, and that the type of restoration upon which Mr. Lebenbaum agreed with the Government; that the figures on costs of restoration as computed by defendants Gawzner approximated the sum of \$80,000, while those agreed upon between defendant Lebenbaum and the Government totalled less than \$20,000. [165]

Counsel for the Government then argued that defendants Gawzner were not entitled to be heard concerning the cost of restoration, and that defendant Lebenbaum was entitled to waive restora-

tion from the Government if he so desired; counsel for defendants Gawzner pointed out that defendants Gawzner also had a contract with the Government, in which the Government stipulated it would restore the premises.

Counsel for defendant Lebenbaum argued that though the list of restoration items which Government counsel had characterized as stipulations had been signed by defendant Lebenbaum, such defendant intended to object to their introduction unless it were proven that the official who signed them on behalf of the Government had express authority so to do; further that any agreement thereby made had been breached by the Government.

At the close of the hearing of October 23, 1946, each counsel for defendants stated that each would insist on being heard during the trial on behalf of his client or clients, and that defendants would not be able to join in presenting testimony; whereupon all counsel agreed their respective positions had been changed with reference to the presentation of evidence at the trial.

On October 24, 1946, arguments between counsel concerning the effect upon the proceedings of the alleged agreements between defendant Lebenbaum and the plaintiff; counsel agreed that the presentation of evidence to the jury should be delayed until the matter should be determined.

On October 25, 1946, counsel announced that negotiations for settlement as to the amount of the award [166] were in progress; on October 28,

1946, counsel for defendants Gawzner announced that a joint offer had been made by all the defendants to the Government for a specified sum of money in complete settlement of the litigation involved herein so far as the Government is concerned, the sum so agreed upon to be treated as between the defendants themselves as a verdict of a jury, so that the question would be left open as between the defendants, but that the offer had not as yet been accepted, that all counsel had hopes that a settlement would ultimately be made.

The Court then suggested that counsel complete the presentation of all matters upon which a ruling of the Court was desired prior to trial. Further discussion and argument were had, at the conclusion of which counsel for defendants Gawzner announced that in view of the position taken by the plaintiff with reference to so-called agreements between plaintiff and defendant Lebenbaum, counsel felt that he was entitled to reverse his previous position and to insist that the Government be bound by its agreement with defendants Gawzner with reference to the three months period, rather than the two months period, as concerned restoration.

On October 29, 1946, by agreement of counsel, the jury was excused until November 26, 1946, prior to which time it was dismissed.

On November 26, 1946, plaintiff and defendants entered into a stipulation for judgment, which is in part as follows:

“Whereas the above entitled and numbered proceeding has been instituted by plaintiff to determine the just compensation to be [167] paid by it for the condemnation and taking by plaintiff of the estate or interest in the property hereinafter described, together with the damages arising through its obligation to make certain restoration to said property. . . .

“Whereas the stipulating parties have agreed upon the compensation to be paid by the plaintiff for such condemnation and taking and such damages as aforesaid. . . .

“(b) That the sum of \$205,000 without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in subparagraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by the plaintiff from the defendants, [168] reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration. . . .”

Said stipulation further recited that although the Government took formal exclusive possession of said premises by order of the Secretary of War, on July 10, 1944, defendant Leo Lebenbaum was

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The Court then suggested that counsel complete the presentation of all matters upon which a ruling of the Court was desired prior to trial. Further discussion and argument were had, at the conclusion of which counsel for defendants Gawzner announced that in view of the position taken by the plaintiff with reference to so-called agreements between plaintiff and defendant Lebenbaum, counsel felt that he was entitled to reverse his previous position and to insist that the Government be bound by its agreement with defendants Gawzner with reference to the three months period, rather than the two months period, as concerned restoration.

On October 29, 1946, by agreement of counsel, the jury was excused until November 26, 1946, prior to which time it was dismissed.

On November 26, 1946, plaintiff and defendants entered into a stipulation for judgment, which is in part as follows:

“Whereas the above entitled and numbered proceeding has been instituted by plaintiff to determine the just compensation to be [167] paid by it for the condemnation and taking by plaintiff of the estate or interest in the property hereinafter described, together with the damages arising through its obligation to make certain restoration to said property. . . .

“Whereas the stipulating parties have agreed upon the compensation to be paid by the plaintiff for such condemnation and taking and such damages as aforesaid. . . .

“(b) That the sum of \$205,000 without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in subparagraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by the plaintiff from the defendants, [168] reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration. . . .”

Said stipulation further recited that although the Government took formal exclusive possession of said premises by order of the Secretary of War, on July 10, 1944, defendant Leo Lebenbaum was

permitted to operate said premises until July 15, 1944 in consideration of his agreement to pay the United States of America the sum of \$1,672.23, which sum was to be credited in favor of the United States upon any obligation thereof to pay compensation for the taking of said premises; that such total credits, including the sum on deposit, amount to \$75,365.78, the judgment should provide that the sum of \$129,634.22 be paid by plaintiff into the registry; the stipulation further provided that the right reserved by plaintiff to remove any improvements within a reasonable time after July 1, 1946 as reserved in its third amended complaint was thereby surrendered in favor of whomsoever the Court should find and determine is "the legal owner of such premises."

The stipulation further provided:

"That if competent witnesses were sworn and testified, their testimony would be that the sum of \$205,000, without interest, together with the surrender of plaintiff's right to remove improvements and structures placed upon said premises by it and the vesting of title thereto in the legal owner of said premises, constitutes fair, just [169] and adequate compensation to be paid by plaintiff to the parties entitled thereto for the taking of the estate and interest described in Paragraph III in the real and personal property hereinafter described in Paragraph V, together with full satisfaction of all damages which have accrued, or will accrue, by reason of the plaintiff's failure to make restoration, . . .

“That this Court shall retain jurisdiction to determine the amount of the interests of all parties who have appeared in this proceeding and who may hereafter appear herein, if any, in and to the compensation which shall be ordered paid by the plaintiff in the judgment to be filed pursuant to this Stipulation, the same as though a jury had rendered a verdict for said sum of \$205,000 without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, excepting that defendant, Leo Lebenbaum shall be deemed to have received upon account of any compensation found to be due him, payment of the sum of \$1,672.23.” [170]

The judgment followed the wording of the stipulation.

Shortly after the filing of the stipulation and judgment this Court requested counsel for the defendants to file briefs stating their respective positions with reference to the division of the award.

In his brief filed January 2, 1947, counsel for defendants Gawzner again urged that the condemnation proceedings effected a termination of the lease under Paragraph Ten thereof; that if the lease were not cancelled, then, still under the provisions of the lease defendant Lebenbaum had assigned any interest in the award to defendants Gawzner.

Counsel further urged that if defendant Lebenbaum should be entitled to share in the award for

the use of the premises, as distinguished from the restoration, then the measuring rod should be the bonus value, if any, of his lease; that a lessee could not, when the Court apportions an award, recover for loss of profits; that the defendants Gawzner were entitled to the portion of the award covering restoration of the property, even though the lease requires the tenant to maintain the interior of the hotel, and in this connection, counsel pointed out that though defendant Lebenbaum had been in possession of the hotel for six months after the Government's use had terminated, restoration had been made only in part; that if it should be determined that defendant Lebenbaum should share in the part of the award devoted to restoration, then he should not be entitled to any of the restoration costs waived by him under the so-called stipulations with the Government dated February 12, 1946. [171] Counsel in his brief pointed out that though the Court had not ruled on whether the said documents were binding upon defendant Lebenbaum, but, quoting counsel: "We do not hesitate to say that the existence of these documents played no small part in inducing the defendants Gawzner to accept the settlement figure reached with the Government." In connection with the statement just quoted, counsel observed, "There can be no apportionment of a fund that was not recoverable from the condemnor."

Counsel for defendants Gawzner then mentioned seven items which in his opinion the Court should determine, and among which items the total award

should be divided, i.e., value of use of premises not covered by the lease; value of use of premises covered by the lease; what portions of the value last mentioned should be awarded to lessee and lessors respectively; that total award for restoration of the premises; the portion of the award for restoration which should be allocated to the exterior of the leased premises for which the defendant Lebenbaum has no obligation to maintain; the portion of such award for restoration which should be allocated to the interior of the leased premises which defendant Lebenbaum has an obligation to maintain; the portion of the sum so allocated for the restoration of the interior that the defendant Lebenbaum is entitled to receive.

In defendant Lebenbaum's brief filed January 3, 1947, it was conceded that defendants Gawzner were entitled to recover the rental for the lands not covered by the lease; that defendants Gawzner were entitled to recover the cost of restoration, or rehabilitation of any portions of the exterior of the buildings or any other parts of the property [172] for whose maintenance the Gawznors are liable under the lease; or which suffered destruction by undue or careless usage by the Government; that defendant Lebenbaum should receive that portion of the award representing compensation for the use and occupancy of the leased premises; also, that portion of the award representing compensation for restoration and rehabilitation of the interior of the buildings and of the furniture, furnishings and equipment for the reason that "by his covenant

contained in the lease there is imposed upon him the obligation to do the work and pay the cost of such rehabilitation and restoration, and for the further reason that the property would be untenable as a resort hotel, and Lebenbaum's lease would thus be rendered useless, if he did not so rehabilitate and restore. He could not compel the defendants Gawzner to do the said interior work of rehabilitation and restoration, yet he would still remain liable in full for the rent under the lease. . . ."

Counsel for defendant Lebenbaum then pointed out that there existed no controversy between defendants concerning the payment of rent; that defendant Lebenbaum concedes his obligation to pay rent was unimpaired by the condemnation proceedings, but that defendants Gawzner persistently maintained that the lease had been terminated and had refused to accept rent tendered them. Counsel cited *Pasadena v. Porter*, 201 Cal. 381; 257 Pac. 526; *Gluck v. Baltimore*, 32 Atl. 515, 81 Md. 315; *John Hancock, etc. Insurance Company v. U. S.*, 155 Fed. 2nd 977; *U. S. v. General Motors Corp.*, 323 U. S. 373, as authority for his contention that where the obligation to pay rent under the lease continues, the recovery of the tenant is not [173] limited to bonus value, and that the lessee is entitled to the fair rental value of the leased premises, undiminished by the rental under the lease.

On January 17, 1947, the first of a series of pre-trial hearings as to the issues between the several defendants was had. At said hearing, the Court

announced it was of the tentative opinion that, if possible, the lease should be followed as closely as practicable in the division of the money, and suggested that the award of \$205,000 should be separated into the following different elements: What amount was contemplated in the award as compensation for exterior improvements and other items for which the landlord is responsible? What amount may be estimated or contemplated for restoration of destroyed property, for repair of damaged property, for renovations as to the interior of the premises? What amount should be apportioned for premises exclusively owned by the landlord and not within the leased premises? What amount should be apportioned for use and occupancy?

Counsel for defendant Lebenbaum pointed out that after segregating the amount due the landlord for lands lying outside the lease, and the portion necessary for exterior restoration, the lessee should receive the remainder of the award, including the portion necessary for restoration of the interior of the buildings, the furniture and furnishings. As to the remainder of the award, counsel for defendant Lebenbaum maintained that the Court had no jurisdiction to divide such fund, in that the controversy as to the ownership of such fund presented no Federal question and there existed no diversity of citizenship between the defendants; that any [174] decision the Court might make which purported to segregate a portion of the fund and pay the same to the defendants Gawzner as rent would not be

res judicata upon the personal covenants of Lebenbaum to pay rent.

Counsel for defendants Gawzner replied that the Court had acquired jurisdiction under the condemnation proceedings, and therefore had jurisdiction to decide conflicting claims to the fund regardless of the citizenship of the claimants, citing *Oliver v. U. S.*, 156 F. (2d) 281; that defendants Gawzner should receive the entire award, but that if the Court should rule against such contention, then the Court should divide the award between the parties; that all of the fund for all of the restoration should be paid to defendants Gawzner, or should be impounded for restoration purposes.

Counsel for defendants Gawzner further pointed out that the Government was in the same position that a person would have been had such person sublet the property; that such person would have been obligated to pay the landlord the same rents payable under the lease; that the Government had paid what a lessee would have paid for the premises during the period of time involved; that the very least a tenant could expect to pay the landlord would be \$60,000 a year, considering the amount which defendant Lebenbaum had paid defendants Gawzner for the six months during which the premises were operated under the lease; that such figure was the minimum, because the six months in question were the six "lean" months of the year.

The Court then inquired if counsel had been able to arrive at any estimate concerning the amount necessary for restoration; counsel for defendant

Lebenbaum [175] replied that the maximum estimated by his client was \$60,000, and counsel for defendants Gawzner replied that the amount estimated by his client was over \$80,000.

Counsel for defendant Lebenbaum then observed that a difficult problem was presented in the question of what is the difference between extraordinary and ordinary wear and tear, and that he knew of no means whereby such difference could be shown by evidence; that as to the division of the fund after restoration costs had been ascertained, it would be reasonable to assume that had the operation of the hotel continued, the parties would each have made the amount of profits each received before Government occupancy, and that the record of such six months operation might provide an equitable basis for allocation or distribution of the fund.

On February 28, 1947, a further pre-trial hearing was held; the Court inquired of counsel if their clients had been able to come to any agreement concerning restoration costs and was informed that counsel felt they were far apart in their negotiations and could reach no basis upon which further negotiations might be predicated; the Court then asked if counsel would produce evidence to show the value of the property which had been totally destroyed, if any, during the occupancy of the Government; also, evidence as to the amount for decorating of the inside, and for painting on the outside; also, what amount would be necessary for

replacing wornout articles; the Court also inquired if counsel had arrived at any figures on the items mentioned which served as a basis for the amount accepted in settlement; counsel for defendants Gawzner replied that there would be no way of telling what portion [176] of the amount paid in settlement was based upon restoration and what portion upon rent, because the figure was arrived at for the purpose of compromising a piece of litigation in which both the amount of restoration was disputed, and the amount of rental was disputed. That no segregation of these respective amounts was made.

It was then mentioned by counsel for defendant Lebenbaum that said defendant had expended \$17,000 for restoration since taking possession of the premises; counsel for defendants Gawzner stated there would be a dispute concerning whether all of this amount had been spent for restoration.

On March 18, 1947, counsel for defendants Gawzner moved that the trial concerning the apportionment of the award between the defendants be placed off calendar, for that the reason that no pleadings were on file which raised the issues between the respective defendants, in that none of the defendants had filed an answer to the plaintiff's third amended complaint, and stated that this fact had escaped counsel's notice; an answer on behalf of defendants Gawzner, and a cross-complaint was proffered by counsel for said defendants, and marked "Lodged." Counsel for defendant Leben-

baum objected to the filing of the cross-complaint on the ground that it contained allegations concerning matters occurring after the Government had terminated its occupancy, and that it contained certain matters not properly before the Court in the condemnation proceeding.

After argument, the Court allowed the filing of the answer of defendants Gawzner to the third amended complaint, and ruled that certain allegations in the cross-complaint [177] might remain on file to be considered as part of the answer, but that the motion to file the cross-complaint as such was denied except as to those portions which were to be considered part of the answer. The motion to vacate the date for trial was denied.

It was then stipulated, and the Court so ruled, that the answer of defendant Lebenbaum to the second amended complaint might be deemed his answer to the third amended complaint.

Whereupon trial as to issues between the defendants proceeded. There was introduced in evidence by defendants Gawzner, upon stipulation of counsel, the lease involved herein; a notice of termination of lease, dated August 4, 1944, signed by defendants Gawzner, stipulated to have been served upon defendant Lebenbaum on August 11, 1944, was received in evidence over the objection of defendant Lebenbaum.

Counsel for defendants Gawzner then made formal motion that the Court make an order directing payment of all of the funds on deposit in the registry of the Court to the defendants Gawzner

on the ground that the institution of the condemnation proceeding and the giving of the notice of termination operated as a cancellation of the lease. The motion was denied.

The following stipulation was then made in open court by counsel for the defendants:

“It is stipulated that the portion of the award made by the judgment of November 26, 1946, in the within cause, that should be allocated to restoration, repair and replacement of the property [178] condemned, both real and personal, is the sum of \$91,296.00.”

Counsel for defendants Gawzner then read into the record an account of items of restoration and replacement, the estimated cost of which made up the \$91,296.00, whereupon both counsel agreed that there would be a dispute as to whether certain amounts already spent by their respective clients could be chargeable to the sum mentioned. Both counsel stated that they agreed with the Court that evidence should be introduced concerning the sums already spent by their respective clients on restoration.

On March 19, 20 and 21, 1947, the trial continued; the testimony of two experts was offered by defendants Gawzner, and the following question was asked of the first witness R. E. Allen:

“. . . will you please assume, first that the lease, of December 15, 1943, defendants Gawznors' Exhibit No. 1, was in existence on July 10, 1944, and was then in full force and effect and that Mr. Lebenbaum was occupying the premises; second, that

Mr. Lebenbaum had the right to assign or sublet the premises for a period from July 10, 1944 to June 1, 1946, or that the lessors would consent to such an assignment or subletting; third, that the assignee or sublessee would either maintain the premises in their then condition during the period of occupancy or would, upon termination [179] of the occupancy, restore the premises to the condition they were in on July 10, 1944, or pay the cost of such restoration; that the premises were to be continued to be used as a hotel and that the assignee or sublessee would pay the rent called for by the lease to the landlord and otherwise comply with the terms of the lease; that the term of such occupancy, assignment or sublease, would be from July 10, 1944 to June 1, 1946. Upon these assumptions, what, in your opinion, was the market value of the lessee's interest in that lease? In other words, what, in your opinion, would a willing purchaser have paid to a willing seller for the right to sublet or become the assignee of the premises involved for the period of July 10, 1944 to June 1, 1946?"

At this point, and prior to the witness' answer being given, an argument on points of law was had between counsel for the defendants. Counsel for defendant Lebenbaum stated that he assumed counsel for defendants Gawzner was seeking to prove there was no "bonus value" to the lease; said counsel further stated that such theory of valuation did not apply to the instant case, citing *John Hancock Mutual Life Insurance Company v. United States*, 155 F. 2d, 977, page 978, as follows:

“If, after a condemnation, a lessee [180] remains under obligation to pay rent, it is entitled to damages equal to the fair rental value of the leased premises. If the lessee is no longer under such obligation, then it is entitled only to the difference between the fair rental value and the rent stipulated in the lease.”

Counsel for defendant Lebenbaum then pointed out that defendant Lebenbaum was still under the obligation to pay rent, that the lease had not been terminated; that defendants Gawzner maintained the lease had been terminated, and had refused to accept rent; that the so-called “bonus value” theory thus did not apply; that if it were true that the lease had no bonus value and if for that reason defendant Lebenbaum were not entitled to any portion of the award for the use and occupancy during the period involved, then it would not follow from that premise that defendants Gawzner would be entitled to all of it.

After further argument between counsel, the witness was allowed to answer the question, subject to a motion to strike, and the answer was that in the opinion of the witness the lease had no bonus value or market value as of the date the Government took over the premises. The witness gave as his reasons that the percentages of the gross receipts were too high, and the obligations imposed upon the tenant were too onerous. The witness also stated that the damage done to the hotel by the Army use would be about twice that which would

have been occasioned by civilian use, and for a lessee to obligate himself to put the property back and restore it would be "just prohibitive." That the breakage [181] fund of 3% of the income from beverages and rooms was so much additional rent, amounting to a maximum of \$3,000 a year.

A second expert Charles G. Frisbie was called by defendants Gawzner, and a similar question was asked of him. A similar objection was interposed by counsel for defendant Lebenbaum, a similar ruling was made by the Court. The witness answered that in his opinion the lease had no bonus or market value. He stated that he had examined a number of different hotel leases, but had not found one with as high a rental; that the lease could not have been sold to anyone as of the date the Government took over.

On cross-examination the witness Frisbie stated that he based his opinion upon the terms of the lease itself, and not on other sales of similar leases; that the fact that the tenant of the Miramar Hotel property operated it at a substantial profit would not change his testimony; that he knew of the earnings of the lessee prior to July 10, 1944; that the fact that the lessee had expended \$20,000 in improvements also would not vary his opinion; that a prospective purchaser would consider the terms of the lease, and would compare it with the terms of other leases he could get; that the only reason for a bonus on any lease would be that such lease contained very favorable terms which were lower than other leases.

The witness further stated that he was familiar with market conditions as they prevailed in the area during [182] the period of the Government's occupancy; that there were not many hotel leases available; that hotel properties reached a peak during the period from July 10, 1944 to June 1, 1946; that such properties were at an "all-time high" in earnings during such period.

The witness was then asked what, in his opinion, was the reasonable market rental value of the leased property, in its entirety, during that period of time; counsel for defendants Gawzner objected that such testimony was incompetent and immaterial; the objection was overruled, and the witness answered that in his opinion, for a period of $22\frac{2}{3}$ months the figure would be \$161,500; that he took into consideration the fact that the period of time was a very good one, that leading up to that time the occupancy had been greater and room rates were getting higher; that taking all those figures into consideration he thought the sum mentioned was a fair rental value of the entire property during that particular period; that he took into account the use which the Army would make of it and made the figure a little higher because of the nature of such use.

In answer to a question from the Court, the witness Frisbie stated that he knew of the financial statements of income and expense and net operation of the property as a hotel prior to the Government's occupancy, but in arriving at the value of the lease itself, its sale value, he took into consideration only

a comparison with other existing leases and the terms of such leases; that for a lease to have bonus value it must have lower terms than other available leases; that by "bonus value" he did not mean the same as market value; that he decided because of the [183] very high rate that was called for under the lease, no bonus value existed.

The Court then asked the witness what factors he considered when he gave the figure of \$161,500, and he stated he considered the following matters:

That there were 135 rentable rooms; that occupancy rate was going up; that ordinarily on such percentage leases, as room sales, beverage sales, and food sales went up, ordinary costs came down, that is, there would not be so much cost per dollar of income; that the figure he mentioned was what he thought would be the fair rental value for the right to occupy the property and conduct a hotel business upon it, and sell food and liquor, and was the amount a man should pay for the use of the property during that period of time.

The witness then stated, in answer to a question from counsel for defendant Lebenbaum that he knew of no comparable hotel property in the vicinity of the premises taken which was available for lease, either by taking a new lease, or by purchasing an existing lease, during the period of the Government's occupancy. On further cross-examination, the witness stated that a prospective purchaser would be interested to know the past history of the property, what had been accomplished, if it had a

good occupancy; had the operator been able to obtain good rates on the rooms; that anyone getting a lease would consider the "business angle" of the property, but the two were separate things; one was the right to the property, which is the lease, and "the other is the business angle to it, to make a profit."

The witness further testified on direct examination [184] the reasonable value of the use and occupancy of the premises occupied by the Government, and owned by defendants Gawzner and not leased by defendant Lebenbaum, was \$10,500 during the period involved.

Counsel for defendant Lebenbaum then moved to strike the testimony of both witnesses for defendants Gawzner to the effect that the lease had no bonus value, or market value on the ground that the "bonus value" theory did not apply, and on the further ground that neither witness based his opinion on any sales of hotel leases occurring at or near the period of time indicated; that neither witness took into account as an element in arriving at his opinion, the business operation of the property by the defendant Lebenbaum for the period from December 15, 1943 to July 10, 1944. The Court reserved a ruling on said motion.

On March 21, 1947, further trial was had; defendant Lebenbaum introduced the witness Lloyd S. Pettigrew, who produced a report made by Horwath and Horwath. The witness testified that his firm specializes in hotel accounting throughout the

United States; that his firm did the accounting for defendants Gawzner prior to the time the property was leased to Mr. Lebenbaum; that the witness was familiar with the lease; that his firm opened the books for Mr. Lebenbaum, as lessee of the hotel, and audited such books and prepared statements during Mr. Lebenbaum's operations. The witness was then asked the amount of net profit resulting to the lease during his period of operations.

To this, counsel for defendants Gawzner objected on the ground that such question constituted an attempt to [185] introduce profits resulting from the operation of a business, and was inadmissible in a condemnation proceeding; counsel for defendant Lebenbaum replied that the evidence was offered on the theory that, as testified by the witness Frisbie on cross-examination, a person buying a lease or a hotel in considering the business opportunity offered would consider the earning record of the hotel, and that such testimony would have a bearing on what a prospective purchaser would be willing to pay for a purchase of the lease.

Counsel for defendants Gawzner then stated that the rental previously paid might be considered, but that evidence of profits was inadmissible. Counsel for defendant Lebenbaum stated he conceded that the profits as such would not be recoverable as damages sustained through condemnation, but that such profits would be considered in fixing the market value of a piece of income property.

Counsel for defendant Lebenbaum stated he offered in evidence the report under discussion, the

same being Exhibit A of defendant Lebenbaum, and consisting of a financial statement prepared by the firm of Horwath and Horwath, covering the operations of Leo Lebenbaum, as lessee of the hotel premises during the period beginning January 1, 1944 to July 15, 1944. The report was received subject to a motion to strike. The Court reserved its ruling on said motion.

Prior to adjournment of the session of March 21, 1947, counsel for defendant Lebenbaum conceded that he could offer no evidence which would fix the value of the occupancy of the premises of defendants Gawzner not under lease at any figure lower than that [186] testified to by witnesses for defendants Gawzner, to-wit: \$10,500; said counsel further stated that he would adopt the testimony given by one of the witnesses for defendants Gawzner, Mr. Frisbie, that the sum of \$161,500 was the reasonable rental value of the hotel property during the period of the Government's occupancy, and that he urged such figure be used by the Court in arriving at its decision. He then pointed out that if the \$91,000 agreed upon as restoration cost, and the \$10,500 testified to as being the rental value of the premises not under lease were added to the sum fixed by Mr. Frisbie, the total would be \$263,746, which sum was more than the total of \$205,000 received by the defendants from the Government. Said counsel then stated:

“. . . but I am trying to figure out an equitable means of having each party bear his share of having

accepted less from the government than the proof now before your Honor shows. In other words, had there been a verdict rendered according to the evidence that is now before your Honor, it would have been for \$263,746, but we have destroyed that possibility by agreeing with the Government on a lesser sum.”

Counsel for defendant Lebenbaum then suggested that if each of the three items were reduced to 77% of their amounts, the total would be the amount paid by the Government.

Counsel for defendants Gawzner stated that he did not agree on such computations; that the figure given by [187] the witness Frisbie as to rental value of the premises was given on cross-examination, and was not an item which the Court could consider as independent evidence.

On April 25, 1947, further trial was had, and a discussion ensued between counsel in open court concerning a list of expenditures which had been filed by defendant Lebenbaum, which list his counsel had stated in a memorandum dated April 14, 1947, represented a compilation of amounts spent by such defendant, or obligations incurred by him for furniture, furnishings, repairs, replacements, decorations, etc., necessary to place the premises in a condition for occupancy subsequent to the termination of the Government's use. That all items of merchandise covered by any of said expenditures were of as good character and value as the items of the same nature which were in the hotel at the commencement of the term of the lease, and none of the

items were for the repair or restoration of damage, loss, wear and tear occurring after the defendant Lebenbaum took possession of the premises from the Government.

Counsel for defendants Gawzner argued that some of the items on the list could not, under any decision the Court might render, be considered proper restoration, and called attention to some of the figures in dispute, mentioning that certain sheets replaced by Mr. Lebenbaum were not as good quality as those originally in the hotel as of July 10, 1944.

The Court then directed the attention of counsel to the stipulation with the Government, wherein the sum of \$205,000 was represented as a fair, just and adequate compensation and in full settlement and compensation as to [188] damages arising out of any failure to restore the premises, real and personal, reasonable and ordinary wear and tear excepted. The Court then queried counsel whether an item, such as the sheets mentioned, when replaced by Mr. Lebenbaum might not equal in condition the sheets that were in the hotel on July 10, 1944, less ordinary wear and tear during the period of the Government's occupancy? Counsel replied:

“Mr. Burrill: I have my own ideas on it, your Honor, although I don't know whether they will be helpful to these gentlemen. But I think that gets us back to the old dispute we had between the government and the landlord and the lessee, and I believe for once Mr. Hearn and I will be in accord before your Honor when I say that we argued with the government counsel that it didn't make any dif-

ference, that, if they paid a specified rent that included ordinary wear and tear, as a part of the amount that they would pay, then their restoration item would be a certain figure. On the other hand, if they paid a rent which did not contemplate the use of ordinary wear and tear, then their restoration would be a greater figure. I think, as Mr. Hearn so aptly put it many times, that the government couldn't avoid paying for the ordinary wear and tear of the furniture in those [189] premises, regardless of which way they put it. If they didn't pay for it in restoration, then they must pay for it in rent. Am I quoting you correctly?

“Mr. Hearn: Much better than I can say it.

“Mr. Burrill: So that when we came to the settlement with the government, it is pretty much a question of taking the language of the stipulation and the language of the government as the government counsel wanted it written up, because they had complained about this ordinary wear and tear situation and argued about it for days. And I think as far as both Mr. Hearn and I were concerned, it was the outside amount of money that was involved rather than whether we said ordinary wear and tear or didn't. Am I not correct in that?

“Mr. Hearn: Yes; I think so.

“Mr. Burrill: Next, we included both restoration and rental in the amount of recovery we got from the government and we were willing to concede that what the government paid was rental and was restoration.”

The Court then read a portion of the said stipulation to counsel.

“Mr. Hearn: If your Honor please [190] I understand that to mean this, that the government had an obligation to restore such damage as it might do to the property over and above ordinary wear and tear and that that obligation to so restore is deemed compensated by this judgment. However, that does not mean that the item of ordinary wear and tear entered into the judgment at no place whatsoever. It really entered into the balance of the judgment over and above that item of damages, that is to say, had we litigated the subject of how much damage the government did to the premises, then ordinary wear and tear would have been included over that particular question, but by the same token, as Mr. Burrill has said, it would have been included in the amount that was set up for rent. So that I understand the award that is now in the registry of the court includes a sum appropriate to ordinary wear and tear, probably under the heading of ‘rent.’ Do you so understand it, Mr. Burrill?”

“Mr. Burrill: I understand that the judgment completely vindicated the government from any obligation that it had. It vindicates the government from any obligation of paying rent for the premises and also any damages that they had done. Now, I still contend that the language that was put in here was to avoid the dispute that [191] we had had with the government throughout that ordinary wear and tear had to be included in the rental item, and restoration cost is something over and above that. Now,

we are contending, on behalf of the defendant, and when I say 'we' I mean both Mr. Hearn and myself, that the government couldn't avoid paying for that ordinary wear and tear, whether they paid for it in restoration or whether they paid in rent. It had to be paid for in some fashion or another. But we had our stipulation and our judgment all inclusive, as I understand it, so that the government was vindicated completely there.

“The Court: That is true but the judgment is practically in the language of the stipulation and, on the bottom of page 2 of the judgment, it recites these words, the same as the stipulation recites, ‘to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by the plaintiff and from the defendants, reasonable and ordinary wear and tear excepted.’ If that isn't the formula that you are to use, I wish you gentlemen would give the court a formula that you would like to have used, so that we can segregate the outside from the [192] inside and whether a reasonable wear and tear is to be considered, or, if you can agree upon—or if you think the stipulation and the judgment are subject to more than one construction, I would like to know it. I have to take the record. I have to take your agreement.”

After discussion between counsel, it was stipulated by them in open court that the sum of \$91,296 represented the sum necessary to restore the premises into the condition that they were in as of July 10, 1944.

The Court then requested that counsel furnish a segregation of the amounts devoted to exterior, as distinguished from interior, restoration.

Counsel for defendants Gawzner then stated that such amounts had not been segregated, and in taking bids for restoration work, some of the bids had been taken for an all-over amount including work to be done on both exterior and interior premises. Said counsel further argued that as the entire premises, exterior and interior including furniture, belonged to the defendants Gawzner, such defendants should be given the entire award for restoration; that the owners were entitled to have the restoration done according to their desires.

Counsel for defendant Lebenbaum remarked that the defendants had not been able to agree on the colors in which certain portions of the premises should be redecorated, the pattern of the silverware, china, and many other items.

Both counsel stated at said hearing that they were unable to state how much the figure stipulated as restoration [193] cost represented repairs, which under the lease would be obligations of the tenant, and repairs, which under the lease, would be obligations of the landlord.

The Court then announced that if counsel could not agree to such segregation, it would be necessary to take evidence before the Court could make a ruling as to division of the remainder of the award.

Counsel for defendants Gawzner then observed that a situation confronted the parties which entailed

a major restoration never within the contemplation of the parties when the lease was executed; that the restoration required far exceeded any ordinary maintenance within the provisions of the lease, and the situation was such as not controlled entirely by the lease.

Counsel for defendant Lebenbaum stated he did not agree with counsel for defendants Gawzner; that on the contrary, he believed the language of the lease to be clearly applicable to the things that did happen, even though they were not contemplated.

The Court then stated it would render a decision when the parties made the segregation he had previously requested.

On May 12, 1947, a further trial was had, at which hearing counsel for defendant Lebenbaum announced a willingness to stipulate concerning the allocation of certain portions of the restoration award as being properly chargeable to the landlord under the lease, and certain other portions to the tenant, naming the items and sums covered.

Counsel for defendants Gawzner stated he was obliged to refuse to accept such stipulation, and rather [194] than attempt to break down the various figures and have some possible dispute as to whether or not any amount allocated to the exterior of the premises was properly spent or otherwise, would submit the suggestion that the entire restoration fund of \$91,276 be spent under the joint control of the landlord and the lessee, said fund to be under the supervision of an interior decorator selected by the parties.

Counsel for defendants Gawzner further stated that his clients had already spent around \$25,000 on restoration, and in addition had paid taxes and interest from the time the Government entered the premises.

Counsel for defendant Lebenbaum observed that a large portion of the expenditures made by Mr. Gawzner could not be considered as referable to damages done by the Government, and cited restoration of the roofs as a large item; that defendant Lebenbaum had offered to turn the entire restoration award over to defendants Gawzner and permit them to make restoration, provided Mr. Lebenbaum should be paid the sum of \$18,000 which he had expended, plus the sum of \$2,000 which remained in the restoration fund established by the lease.

On June 6, 1947, further trial was had, and at that time counsel announced that they had arrived at a stipulation covering the disposition of the fund allocated to restoration.

The said stipulation, dated June 5, 1947, and filed June 6, 1947, provided that out of the said sum of \$91,296, defendant Lebenbaum should be paid \$10,500, and defendants Gawzner \$80,796.00; that the parties, upon payment of the respective sums as stipulated, waived any [195] further contentions in reference to the said sum allocated to the restoration, repair and replacement of the property condemned, both real and personal.

That the acceptance of said sums by the respective parties should be without prejudice to the rights of any of the parties to assert any and all

claims which they had theretofore advanced, or might thereafter advance in reference to the remaining portion of said total award, and that the Court should retain jurisdiction to determine the amount of the interests of the parties to the sum remaining in the registry of the court after the payment of the sums covered by the stipulation thus made.

In a memorandum filed November 25, 1947, by counsel for defendants Gawzner, the Court was informed of some of the terms of a further but unfiled stipulation, which counsel stated was entered into by the defendants concurrently with the stipulation executed June 5, 1947; this unfiled stipulation, which seems to have been a "stipulation upon a stipulation" is said to have provided that defendants Gawzner would use the sum of \$80,796.00 to be paid to him under the stipulation filed of record, to accomplish complete restoration and repair of the premises "into at least as good condition as said premises were in on July 10, 1944." (Emphasis supplied.) The memorandum further stated that said unfiled stipulation also provided that defendant Lebenbaum was relieved from the provision of the lease which required him to deposit three per cent of the proceedings of the gross business as provided by Paragraph Seven of the lease from the date of July 10, 1944 to January 1, 1949, being the expiration date of the five year term of the lease.

Further trial was had on August 14, 1947, at which time the Court informed counsel for the de-

defendants that it was not satisfied with the evidence produced by the parties; that it was the desire of the Court that evidence be presented by a witness who would place himself in the position of a prospective buyer on July 10, 1944, one who would take the figures for the previous six-months operation and try to arrive at similar figures for the period during which the property was to be sub-leased, the period named in the amended complaint; the Court further stated it felt that a prospective purchaser would have considered such figures in determining how much he would offer for the property; that such prospective purchaser also would be obliged to consider the gross receipts during such period in order to determine what rent he would have to pay; that the Court had already asked counsel to agree upon an impartial expert who would present such evidence, but counsel had stated they could not so agree; the Court then suggested that each counsel present such evidence by their respective experts; counsel for defendants Gawzner stated he was compelled to decline to produce such testimony, for the reason that he did not consider such evidence a proper item to be considered. Counsel for defendant Lebenbaum stated he would endeavor to produce such evidence.

On October 22, 1947, counsel for defendant Lebenbaum presented as a witness Lloyd S. Pettegrew, who had testified earlier in the trial. Mr. Pettegrew reviewed his qualifications as a hotel accountant; mentioned that the American Hotel Association had adopted a uniform system of accounts which was

used by about two-thirds of the [197] hotels in the country, which system provided for a departmentalization of the various operations such as food, rooms, beverages, and so on, and listed such expenses and income both by amounts and by percentages. Mr. Pettegrew stated he had placed himself in the situation as it was on July 10, 1944, and estimated or projected forward the operations of the hotel property under the lease for a year; that he did this using as a basis the past results both in the Miramar Hotel and similar hotels in the vicinity and in California, and by the use of trends that were in vogue, or were existing at that time, and had compiled the results of his work in the form of a report; the report was submitted in evidence as defendant Lebenbaum's Exhibit B over the objection of counsel for defendants Gawzner.

During his testimony, the witness was asked to explain certain computations contained in his report, Exhibit B, as contrasted to his report of actual operations previously introduced into evidence as Exhibit A. The witness explained that in Exhibit B, he had taken the position of a well-informed buyer, and had set forth in such report the matters which such buyer would endeavor to anticipate . . . what such buyer would consider before ascertaining the amount he would offer for purchasing the lease. Exhibit A showed a payment of rent by the lessee to the landlord during the 6 months of operation prior to the date of the Government's taking, of the sum of \$30,904.53; Exhibit B showed an anticipated payment of rent by the lessee to the landlord dur-

ing the projected period of operation starting July 10, 1944 and ending July 10, 1945 of the sum of \$91,648.02. Exhibit A showed the actual [198] profit of operation about 6%, while Exhibit B showed such anticipated profit at 20%. The witness explained that the same reasons justified the increase in all of his figures contained in Exhibit B over those contained in Exhibit A, stating, in effect:

During the six months period reflected in Exhibit A, the lessee had just begun operations, and the period involved was the "slack" season for a resort hotel; the property had to be put into shape, and the period reflected was mainly that of the winter season; there was presented a tremendous amount of pre-opening expenses, which in normal hotel operation are of a non-recurring nature, and which are normally incurred only during the first six months of operation; so that a prospective buyer, or the lessee himself, could reasonably and normally expect the anticipated figures shown in Exhibit B to become actualities, after the first six-months period of operation had occurred; that the hotel was in bad physical shape when Mr. Lebenbaum began operations; that the average hotel expends 10 or 11% of its room sales on repairs and maintenance; that during the 6 months period shown in Exhibit A, the tenant spent 22.16% for such repairs; during the period projected in Exhibit B the tenant's anticipated expenditure was set at 10.1%.

The witness further testified that the ratio of money received by the landlord to that received by

the lessee during the period covered by Exhibit A was about three to one. That such ratio was distorted for the reason that the tenant's expenditures were much greater than the ordinary expenditures; that the ratio projected by Exhibit B was 52% for the landlord and 47% for the tenant; [199] that if the tenant had not put most of his money into repairing the premises, and getting the hotel running, the ratio shown on Exhibit A would be nearer that shown on Exhibit B; that a prospective buyer would take into consideration the physical condition of the premises, and whether or not he would be obliged to make repairs after he entered into possession; that such prospective purchaser would also take into account that the \$20,000 called for by the lease had already been deposited by the lessee and used for the benefit of the leased property.

At the conclusion of the testimony of the witness Pettegrew, the Court again informed counsel that it desired the advice of a witness not connected with either of the defendants as a witness, one chosen by the Court, whose compensation would be paid from the fund on deposit, if counsel could not join in producing such expert; both counsel declined to stipulate that such expert could be employed and so compensated; whereupon the Court indicated doubt that it would be able to render a decision without the benefit of independent expert advice, but stated it would endeavor to decide the matter upon the record.

Counsel for defendants Gawzner renewed his motion that the Court order payment to defendants

Gawzner of the sum of \$10,500 as compensation for the use of the premises outside the lease; counsel for defendant Lebenbaum objected, stating that the award for the outside lands should not be made in full, when the award made for the land included in the lease could not be made in full. The Court reserved a ruling on the motion. [200]

We have concluded our attempt to summarize the proceedings which have covered such a long period of time in this Court; the issues involved have been the subject of much concern on the part of the Court, and we feel that this has been shared by the conscientious attorneys representing the Government and the defendants. The defendants have been successful in settling some of their disputes, and the Court is grateful that it has not been faced with the necessity of ruling whether pink wall-paper or blue wall-paper, or percale sheets or muslin sheets would be considered proper restoration, or whether an item involving two dollars or so is to be denominated maintenance after the lessee resumed operations, or restoration of damage occasioned by the Government. Each counsel has maintained that any stipulation made between the lessors and the lessee concerning a distribution of the amount of rental on the premises would result in a waiver of the respective contentions, i.e., that the defendants Gawzner are entitled to the entire amount and a similar contention of the defendant Lebenbaum that he is entitled to the entire amount. The Court has indicated repeatedly throughout these proceedings that it did not intend to rule that either the lessors

or the lessee should be awarded the entire amount to be allocated as rental of the leased premises, and if any stipulation has been made between counsel or the defendants concerning the division of such amount, such stipulation has not been disclosed to the Court.

It has been our view throughout the proceedings that any formula by which the amount due the defendants from the Government could be ascertained would include a [201] definition of market value of the leased premises to one who would devote the same to its highest and best use, to-wit: that of a resort hotel; that in ascertaining the value of such use, the "willing buyer" or sub-lessee would take into consideration the rental to be paid to the landlord; that such buyer would also wish to ascertain what profits might be gained from the operation of the property. It was our impression from the joint brief filed by the defendants, and from the brief filed by the Government prior to the date set for the jury trial, that evidence of profits made by the lessee during the period he operated the property would be given, there being no sales of comparable leases upon which to predicate a market value. We were also of the opinion that any definition of market value must entail a consideration of the terms of the lease; it is evident from the questions asked by counsel for defendants Gawzner of his expert witnesses that he shared the view that such market value would be based upon the terms of the lease.

Any definition of market value based upon the

terms of the lease must therefore include a consideration of the provisions of such lease concerning maintenance and restoration; the obligations imposed upon the lessee with reference to such matters, would, of necessity weigh heavily upon a prospective sub-lessee in his decision as to what price he would pay for the use and occupancy of the premises. Though we were not called upon during these proceedings to render a decision construing such provisions, we note the fact that even in the lease there exists uncertainty. Paragraph Five states that all expenses of upkeep, repair and replacement of the leased premises, [202] other than certain specified portions, shall be the obligation of the lessee, and Paragraph Seven states that it is the intention of the parties that the lessee shall maintain the furniture, etc. in the same condition as the same were at the commencement of the term, and to that end replacements shall be made from the replacement fund, with the object that upon the termination of the lease, the lessors shall "receive back furniture, furnishings and other personal property of as good character and value as the same is in at the commencement of the lease, and that at the termination of the lease any remainder of the replacement fund shall be used to repair and restore the personal property to the state it was in at the commencement of the term." Paragraph Thirteen, on the other hand, obligates the lessee at the termination of the lease, to surrender up peaceable possession of the premises to the lessors "in as good order and condition as the same were in at the com-

mencement of said term, reasonable use and wear thereof and damage by the elements excepted." (Emphasis supplied)

It is evident from the face of the pleadings and stipulations of record herein that counsel for the Government and counsel for the defendants were never able to agree upon whether the Government was obliged to restore the premises to the condition in which they existed prior to the taking, or whether it was obliged to restore to such condition, reasonable wear and tear excepted; from the statements of counsel it is plain that such disagreement was not resolved at the time the stipulation for the payment of \$205,000 to the defendants was made. Had the Court been under the duty to instruct a jury in the main [203] proceeding concerning the obligation of the Government in this regard, the giving of such instruction would have entailed a most careful consideration of the terms of the lease and a comparison of such terms, as against the recitals in the various stipulations between the defendants and the Government.

It is also undisputed that the cost of maintenance and restoration required of the Government by reason of the extraordinary wear and tear occasioned the premises would have been far in excess of the similar cost to an ordinary sub-lessee who used the premises for hotel purposes.

It is true that the stipulation entered into between the Government and the defendants provided that the sum of \$205,000 was to be considered as having been fixed by a jury as the total award for all

interests taken by the plaintiff, and for full satisfaction of all claims for damages against the United States arising from such taking, but it is equally true that no jury could have been instructed to include in its verdict the cost of restoration of wear and tear occurring after the Government left the premises, or compensation to the landlord for repairs which he would have been bound to make under the lease, or compensation to either of the parties for replacements to be made during a period in the future, and up to the termination of the lease. In their stipulations between themselves on the subject of maintenance and restoration, it is obvious that the defendants have made, or agreed to make, restoration beyond what would have been required of an ordinary sub-lessee under the terms of the lease; indeed, it appears that they have made restoration beyond that which could have been demanded of the Government, [204] assuming a concept of its obligations most favorable to the defendants.

Under the terms of the lease, the landlord would have been required to maintain certain portions of the premises, and the cost of such maintenance has been included, we assume from statements of counsel in the record, in the sum allocated by defendants by stipulation to restoration. Under the terms of the lease, the tenant would have been required to maintain certain portions of the premises and to make certain replacements, and the cost of those items has also been included in the sum mentioned.

The sum awarded by the stipulation with the

Government represents an amount which the defendants are to receive from their respective interests in the premises occupied by the Government, during which period the expenses of the landlord have been, as far as we have been able to ascertain, only the payment of the taxes, and the expenses to the lessee have been nothing; how much of the rental which the landlords would have received from a sub-lessee has been expended for the benefit of the landlord and how much of that sum has been included in the sum stipulated by the defendants as referable to restoration, we can not ascertain, and how much of that stipulated sum has been devoted to expenditures not referable to the terms of the lease, and to the benefit of the landlord or the lessee we likewise cannot ascertain; we are not informed as to the disposition of the \$2,000 or so remaining in the replacement fund at the time the Government entered the premises; likewise, we have not been informed what value the parties placed upon the improvements left by the Government, which [205] improvements were stated in the stipulation with the Government to be a consideration in addition to the money award.

In urging that it would be inequitable to allow defendants Gawzner the full amount conceded to be the value for the use of the premises not under lease, counsel for defendant Lebenbaum observed that the funds remaining as compensation for the value of the use of the leased premises, and for the unleased premises, had by stipulation of the defendants, been "cut down in order to allocate a certain

amount to restoration.” And, as observed by said counsel, “We are now in the situation of having settled for a certain number of dollars with the Government. There are so many dollars there, and the cloth, in other words, is not big enough to fit the pattern.” We agree with this pertinent observation of counsel, and with the thought in mind that the obligations under the lease with regard to maintenance and replacement are such important portions of any pattern by which the respective interests of the defendants in the rental value of the premises may be intelligently determined, we add our own observation that the pieces of the pattern have been destroyed; as remarked by one of the counsel for the defendants, “the measuring stick of the lease had been lost.”

Nor can we find any “measuring stick” or theory set forth in any of the cases cited during these proceedings, or in any consulted during our independent research, which can be used to aid us. The Court finds itself in a position similar to that described by the Court in the case entitled: “United States v. 25.4 Acres Of Land,” reported at 65 F.S. 333, when that Court stated, in effect, [206] that the rule of fair market value could not apply, “for it is impossible to conjure up the proverbial figure of a willing buyer.”

In the case before us, we are unable to conjure up the proverbial “willing buyer” or “willing seller” whose negotiations are conducted according to the principles of the law of eminent domain as

enunciated by our statutes and interpreted by the reported cases. The negotiations of the parties herein have resulted in stipulations which we deem of the same practical effect as if they had entered into a contract with the Government for the use and occupancy of the premises during the period mentioned at a price fixed thereby; the persons who, under the provisions of 258 (a) of Title 40, U.S.C.A., are entitled to a distribution of the fund thus obtained have conducted their own negotiations, up to a certain point, and have effected a partial division of the fund according to their own ideas; it is regrettable that the defendants have been unable to further divide the fund by stipulation; it is also regrettable that they have been unable to make, or in any event, to disclose to the Court, if they have made, a segregation of the items represented by the amounts received by each of them from the restoration fund; it is also regrettable that counsel have been unable to demonstrate any applicable basis of division which we can adopt, or adapt, to fit the particular circumstances of this case.

We do not agree that the "bonus theory" of value has any place in the division of the fund remaining; but were we disposed to accept such theory, and to give effect to the testimony of the witnesses for defendants Gawzner—witnesses who are each undeniably qualified generally in [207] their expert field—we should meet an unsurmountable barrier, in that such testimony was based on the provisions of the lease.

Counsel for defendants may each present to the Court proposed findings of fact and conclusions of law and judgment within twenty days from date hereof; such judgment shall recite that the entry of the same, together with the stipulations of the parties, as such stipulations are of [209] record herein, shall finally adjudicate all controversies between the defendants and all claims of either of them arising out of the condemnation proceedings instituted herein.

Dated August 25, 1948.

/s/ JACOB WEINBERGER,
U. S. District Judge.

[Endorsed]: Filed Aug. 25, 1948. [210]

At a stated term, to wit: The September Term. A. D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 20th day of September in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Jacob Weinberger,
District Judge

[Title of Cause.]

Minute Order, Judge Weinberger's Calendar, Sept. 20, 1948, Nunc pro tunc as of Aug. 25, 1948.

It appearing that during the trial of the issues between the defendants herein certain objections

and motions to strike were directed to portions of the evidence, and that rulings on such objections and motions were reserved; that the Court, in making its memorandum of conclusions heretofore filed herein did not include a statement of its disposition of such objections and motions to strike;

And, it further appearing that in order to complete the record herein, a formal ruling upon such matters should be made,

It is Ordered: The objections made by defendant Lebenbaum to certain portions of the testimony of the witnesses Frisbie and Allen are over-ruled; similar motions to strike such testimony are denied.

The motion of defendants Gawzner to strike defendant Lebenbaum's Exhibit A is denied.

The motion of defendants Gawzner to strike a stipulation that Mr. Lebenbaum had deposited \$20,000 upon the execution of the lease, and that all but \$16.95 had been expended to the satisfaction of all defendants, is denied.

The motion of defendants Gawzner to strike the defendant Lebenbaum's Exhibit B is denied.

The objection of defendants Gawzner to certain testimony [211] of the witness Pettigrew, having to do with the giving by such witness of his opinion on whether a rate of operation of the hotel already testified to by such witness would be likely to continue from the period July 10, 1945 to June 1, 1946, is overruled; a similar motion to strike such testimony is denied.

It is Further Ordered; That this Order be entered nunc pro tunc as of August 25, 1948. [212]

Thomas H. Hearn, Attorney and Counselor at Law
400 City Hall, Los Angeles 12

October 6, 1948

Honorable Jacob Weinberger
Judge of the United States District Court
Federal Building
Los Angeles 12, California

In re: United States of America v. 21 Acres
of Land, etc., et al., No. 3752W Civil.

Dear Judge Weinberger:

An unprecedented volume of work has delayed me in the preparation of proposed findings of fact and conclusions of law in the above entitled cause.

Furthermore, I find myself unable at this time to prepare a complete set of findings and conclusions for the reason that I am unable to devise any factual basis from which a calculation can be made resulting in the precise figures of the division of the award made by Your Honor. It is my impression that such a division should be based upon findings as to the values of the respective interests of the parties which were taken by the government in condemnation.

I have read with interest the proposed findings of fact and conclusions of law submitted by counsel for the defendants Gawzner and am willing to say, without prejudice, that those proposed findings and conclusions appear to offer a workable basis upon which we can proceed.

I believe it would be proper, and I most earn-

estly request, that there be included findings to the effect that the defendant Lebenbaum had performed all of the covenants of the lease on his part at the time the government took possession under these proceedings, including the expenditure of approximately \$20,000 in rehabilitation of the property at or about the time that he took possession thereof, together with a finding that the lease was in good standing and in full force and effect at the time that the government took possession. I also [213] respectfully urge a finding to the effect that in entering into paragraph number ten of the lease the parties had in contemplation and intended to deal only with a possible condemnation of the fee title of the realty or of a highway or other permanent easement therein and did not contemplate or intend to deal with a mere temporary taking of the right to the use and occupancy thereof. For the fact of safety I also respectfully urge that conclusions of law be made in harmony with the above requested findings of fact.

I also believe it would be proper, and I respectfully request, that there be a finding to the effect that the defendant Lebenbaum has well, truly and promptly performed all of the terms, covenants and conditions of the lease on his part since he retook possession of the premises upon termination of the government's occupancy on June 1, 1946.

In view of the foregoing suggestions I respectfully urge that there be arranged a conference of court and counsel at which the matter of these findings and conclusions can be discussed, perhaps

informally. I am of the opinion that such a conference would successfully evolve the final findings, conclusions and judgment.

Respectfully yours,

PAUL R. COTE and

THOS. H. HEARN,

By /s/ THOS. H. HEARN,

Attorneys for defendant

Lebenbaum.

THH:emh

cc: Messrs. Hill, Morgan and Farrer

Attorneys at Law

411 West Fifth Street

Los Angeles 13, California

Attention: Mr. Burrill

[Endorsed]: Filed April 18, 1949. [214]

Hill, Morgan & Farrer

Attorneys at Law

1007-1022 Title Guarantee Building

Fifth Street at Hall

Los Angeles 13, California

October 13, 1948

Honorable Jacob Weinberger

Judge of the United States District Court

Federal Building

Los Angeles 12, California

Dear Judge Weinberger:

Re: United States of America v. 21 Acres
of Land, etc., et al., No. 3752W Civil.

I am in receipt of a copy of Mr. Hearn's letter

to you dated October 6, 1948 in reference to the proposed findings of fact, conclusions of law and judgment submitted by our office on behalf of the defendants Gawzner in the above entitled case and proposing certain findings on behalf of the defendant Lebenbaum. I am taking the liberty of writing you in reference to Mr. Hearn's proposed findings in order that you may have in written form, my objections to certain findings which he suggests.

Mr. Hearn has suggested three specific findings, as I understand his letter. In order that this letter will clearly set forth objections made herewith on behalf of the defendants Gawzner, to such proposed findings, I will quote Mr. Hearn's suggested finding and the objections will be set out following each such quotation.

Mr. Hearn's first proposed finding reads as follows:

"I believe it would be proper, and I most earnestly request, that there be included findings to the effect that the defendant Lebenbaum had performed all of the covenants of the lease on his part at the time the government took possession under these proceedings, including the [215] expenditure of approximately \$20,000 in rehabilitation of the property at or about the time that he took possession thereof, together with a finding that the lease was in good standing and in full force and effect at the time that the government took possession."

There is no material objection to this proposed finding. I submit, however, that no issue was ever raised that the lease was not in effect at the date the government filed the above entitled action and took possession of the premises involved. Therefore, the suggested findings proposed by Mr. Hearn would be surplusage. Likewise, if there is any finding in reference to the item of \$20,000.00 I suggest that the finding conform to the facts as established at the trial, i.e., that the \$20,000.00 was deposited in a separate fund in accordance with the terms of the lease and expended by the parties in accordance with such provisions prior to the government's taking, except for a nominal amount still on deposit in the joint bank account of the parties.

Mr. Hearn's second proposed finding and conclusion reads as follows:

"I also respectfully urge a finding to the effect that in entering into paragraph number ten of the lease the parties had in contemplation and intended to deal only with a possible condemnation of the fee title of the realty or of a highway or other permanent easement therein and did not contemplate or intend to deal with a mere temporary taking of the right to the use and occupancy thereof. For the fact of safety I also respectfully urge that conclusions of law be made in harmony with the above requested findings of fact."

I most strenuously object to such a finding, or any similar one. I respectfully urge that such a finding would be in error. There was no evidence offered or introduced which would tend to support

any such finding of fact. The conclusion of law that the lease in question was not cancelled by the institution of the above entitled proceedings and the notice given by the defendants Gawzner is incorporated in the findings and conclusions submitted by the writer on behalf of the defendants Gawzner. Such conclusion was in accordance with Your Honor's rulings during the trial. I respectfully call your attention to the fact that such conclusion was determined as a matter of law from the language of the lease and the notices given by the defendants Gawzner under the lease, particularly paragraph ten thereof.

Mr. Hearn's third proposed finding reads as follows:

"I also believe it would be proper, and I respectfully request, that there be a finding to the effect that the defendant Lebenbaum has well, truly and promptly performed all of the terms, covenants and conditions of the lease on his part since he retook possession of the premises upon termination of the government's occupancy on June 1, 1946."

Again I must object to such a finding. There is no evidence to support such, or any similar finding. I respectfully urge that such a finding would be in error. Your Honor will recall that the writer on behalf of the defendants Gawzner attempted to have the Court hear evidence of occurrences that took place subsequent to the date the government delivered up possession of the premises on June 1,

1946. In particular, we attempted to raise the issue of the alleged violation of the Orders for the Office of Price Administration by the defendant Lehenbaum subsequent to June 1, 1946. [217]

These issues were raised in a proposed Cross-Complaint filed on behalf of the defendants Gawzner. Mr. Hearn objected to any matters occurring subsequent to the date the government returned possession of the premises, i.e., subsequent to June 1, 1946. The court refused permission to file such proposed Cross-Complaint, and on motion of Mr. Hearn struck from such proposed Cross-Complaint all allegations referring to events occurring subsequent to the government returning possession of the premises.

In view of the position taken by Mr. Hearn at the trial, and the action he prevailed upon the Court to take at that time, we frankly are surprised, to say the least, that he should now request the Court to take an entirely contrary position and request the Court to make a finding upon an issue that he once convinced the Court should not be considered.

In conclusion, may we add that we are most anxious that findings, conclusions and judgment be signed and filed as promptly as is convenient to the Court. To that end we shall hold ourselves in readiness to meet any conference suggested by

the Court, or to attend any hearings that may be desired by the Court.

Respectfully yours,

/s/ STANLEY S. BURRILL,
STANLEY S. BURRILL Of
HILL, MORGAN & FARRER.

SSB:hs

CC—Messrs. Paul R. Cote and Thos H. Hearn
400 City Hall
Los Angeles 12, California [218]
[Endorsed]: Filed April 18, 1949.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT AND CON-
CLUSIONS OF LAW UPON DISTRIBUTION
OF AWARD PROVIDED FOR BY
JUDGMENT AND DECREE IN CONDEM-
NATION PROPOSED AND REQUESTED
BY DEFENDANTS PAUL GAWZNER
AND IRENE GAWZNER

The above entitled cause came on regularly for trial before the above entitled Court, the Honorable Jacob Weinberger, Judge presiding without a jury, on March 18, 1947, for the determination and adjudication of the distribution of the award made by the Judgment and Decree in Condemnation made and entered in the above entitled cause on the 26th day of November, 1946, the defendants [223] Paul Gawzner and Irene Gawzner appearing by and

through their attorneys Hill, Morgan & Farrer by Stanley S. Burrill, Esquire, and the defendant Leo Lebenbaum appearing by and through his attorneys Paul R. Cote and Thos. H. Hearn by Thos. H. Hearn, Esquire, and it appearing to the Court that no other person, firm or corporation has appeared herein as to this issue of the above entitled cause or has made any claim or has any claim in and to the compensation paid by the plaintiff herein pursuant to the aforesaid judgment made and entered on November 26, 1946, and evidence, both oral and documentary, was offered and introduced by and on behalf of said defendants Paul Gawzner and Irene Gawzner and by and on behalf of said defendant Leo Lebenbaum and the cause was argued, both orally and by written briefs, and the cause was thereafter submitted to the Court for decision and the Court having made its Memorandum of Conclusions on August 25, 1948:

And the Court being fully advised in the premises hereby makes and files its Findings of Fact and Conclusions of Law.

Findings of Fact

I.

That the above entitled action is an action in eminent domain brought by the United States of America to condemn an estate or interest for a term of years commencing July 10, 1944, and ending June 1, 1946, in and to that certain property, both real and personal, which is more particularly

described in the Third Amended Complaint filed by the plaintiff in the above entitled action.

That the defendants Paul Gawzner and Irene Gawzner were named as defendants in said action as the owners of the said property sought to be condemned and the defendant Leo Lebenbaum was named in said action as a claimant of an interest in said property. [224]

That the said defendants Paul Gawzner and Irene Gawzner appeared in the above entitled cause and filed their answer to said Third Amended Complaint. That the defendant Leo Lebenbaum appeared in the above entitled cause and filed his answer to said Third Amended Complaint.

That the defendants Paul Gawzner and Irene Gawzner are husband and wife and each is an inhabitant of the State of California and resides in the County of Santa Barbara in said State. That the defendant Leo Lebenbaum is an inhabitant of the State of California and resides in the County of Santa Barbara in said State.

That this Court has jurisdiction of the subject matter of the within cause and the parties thereto.

II.

That on the 26th day of November, 1946, pursuant to a stipulation of the plaintiff, United States of America, and the defendants Paul Gawzner and Irene Gawzner and the defendant Leo Lebenbaum there was made and entered in the above entitled cause a Judgment and Decree in Condemnation wherein and whereby there was condemned and vested in the United States of America an estate

or interest in the property, both real and personal, therein described for a term of years commencing July 10, 1944, and ending June 1, 1946, (subject, however, to existing easements for public roads and highways, for public utilities, for railroads and for pipelines) for use by said United States of America for the establishment of a Redistribution Station and related military purposes.

That by said Judgment it was determined that the sum of \$205,000, without interest, was the fair, just and adequate compensation to be paid by plaintiff (United States of America) in full settlement and satisfaction of its obligation for the taking of the interest or estate condemned, together with all compensation to be [225] paid as damages arising out of any failure or default on the part of plaintiff (United States of America) in performance of its obligation to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by plaintiff from defendants, reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration.

That by said judgment the plaintiff (United States of America) waived its right to remove any and all improvements and structures placed upon said real property.

That by said judgment it was provided that the Court retained jurisdiction of said cause to determine the amount of the interests of all parties, who

had appeared in the within proceedings and who might thereafter appear in said proceedings, if any, in and to the compensation which was thereby ordered paid by the plaintiff (United States of America) the same as though a jury had rendered a verdict for said sum of \$205,000, without interest, as their total award for all interests taken by the plaintiff (United States of America) in this proceeding, and for full compensation of all claims for damages against the United States of America arising from such taking, excepting that the defendant Leo Lebenbaum shall be deemed to have received upon account of any compensation found to be due him payment of the sum of \$1,672.23.

That said judgment of November 26, 1946, is by reference included herein and made a part hereof as if herein set out in full.

III.

That there has heretofore been deposited into the Registry of the Court prior to January 5, 1947, the sum of \$203,327.77. [226]

That the defendant Leo Lebenbaum has received prior to January 5, 1947, from the United States of America the sum of \$1,672.23.

That there has been withdrawn from the funds deposited in the Registry of the Court by the defendants Paul Gawzner and Irene Gawzner the sum of \$1,594.02 for the purpose of paying one installment of County taxes.

IV.

That on or about December 15, 1943, the defendants Paul Gawzner and Irene Gawzner, as the owners of all of the property, the use of which property was condemned by plaintiff in the above entitled action, made and entered into a written lease of a portion of said premises to the defendant Leo Lebenbaum, the portion of said premises so leased being commonly known and referred to as the Miramar Hotel and Bungalows, and including in said lease all of the furniture, furnishings and fixtures of said hotel, the use of which furniture, furnishings and fixtures was condemned by plaintiff in the above entitled action.

That said lease was admitted in evidence in the within proceedings as Defendants Gawzner's Exhibit No. 1 and by said reference is included herein and made a part hereof as if herein set out in full.

V.

That paragraph numbered Ten of said lease provides as follows:

“Ten: Condemnation. The Lessee has heretofore been informed and knows that the State of California has heretofore acquired from Lessors, by deed recorded in Book 552, [227] Page 275, Official Records of Santa Barbara County, California, and is the owner of, a strip of land adjoining U. S. Highway 101 which is presently being used by Lessors for hotel purposes but which may ultimately be put to highway uses by the State of California. In the event the State of California or the County of

Santa Barbara or any other public body shall be condemnation acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the Lessors, but Lessors shall pay any and all assessments levied in any such condemnation proceeding. In the event any such condemnation suit shall include any buildings upon said leased premises, said Lessors, at their sole cost and expense, shall relocate the same upon said leased premises in some place mutually agreeable. Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other."

That acting under and pursuant to said paragraph numbered Ten of said lease the defendants Paul Gawzner and Irene Gawzner made and executed on August 4, 1944, and caused to be served on the defendant Leo Lebenbaum on August 11, 1944, a document entitled "Notice of Termination of Lease." That said Notice of Termination of Lease purported in substance to cancel and terminate said lease dated December 15, 1943, pursuant to the provisions of paragraph numbered Ten of said lease upon the ground that the institution of the [227] within entitled proceedings by the plaintiff (United States of America) and the taking of

possession of said premises pursuant to the above entitled proceedings gave to said defendants Paul Gawzner and Irene Gawzner the right to terminate said lease pursuant to the terms of said paragraph numbered Ten thereof.

That said Notice of Termination of Lease was admitted in evidence in the within proceedings as defendants Gawzner's Exhibit No. 2 and by said reference is included herein and made a part hereof as if herein set forth in full.

That by the giving of said Notice of Termination of Lease the defendants Paul Gawzner and Irene Gawzner intended to and attempted to cancel said lease dated December 15, 1943. That the defendants Paul Gawzner and Irene Gawzner by the giving of said Notice of Termination of Lease contend and have throughout these proceedings contended that said lease was thereby cancelled and terminated on September 10, 1944.

That said defendants Paul Gawzner and Irene Gawzner have not at any time since August 11, 1944, waived their said contention that said lease of December 15, 1943, was cancelled on September 10, 1944, by the acceptance of rent, or otherwise.

VI.

That the defendants Paul Gawzner and Irene Gawzner have not, nor have either of them, been paid any sum of money or other compensation for the use and occupancy of the premises, either real or personal, the use and occupancy of which was condemned by plaintiff (United States of America)

in the above entitled proceedings, for the period of July 10, 1944, to June 1, 1946, either by the defendant Leo Lebenbaum or the plaintiff (United States of America); save and except the withdrawal from the Registry of the Court from the funds deposited as aforesaid of the sum of \$1,594.02. [229]

VII.

That on June 1, 1946, pursuant to Order of the within Court, made over the objection of the defendants Paul Gawzner and Irene Gawzner, the plaintiff (United States of America) returned to the defendant Leo Lebenbaum the possession of that portion of the premises, both real and personal, (the use of which had been condemned by plaintiff in the above entitled action) that was covered by said lease dated December 15, 1943, and returned to the defendants Paul Gawzner and Irene Gawzner the possession of that portion of the real property not covered by said lease (the use of which real property had also been condemned by plaintiff in the above entitled action).

That ever since June 1, 1946, said defendant Leo Lebenbaum has continued to occupy and retain possession of said premises, both real and personal, covered by said lease dated December 15, 1943, contrary to the Notice of Termination of Lease, above referred to, and contrary to the demands and wishes of said defendants Paul Gawzner and Irene Gawzner.

VII.

The defendants Paul Gawzner and Irene Gawzner produced on their behalf the witness Edward H. Allen, who was duly qualified as an expert on the valuation of real property and leasehold interests and shown to have knowledge of the property involved and other pertinent facts in connection therewith.

That said Edward H. Allen testified that said lease dated December 15, 1943, had no bonus or market value on July 10, 1944, and particularly that said lease had no market or bonus value for the period that the premises were occupied by the plaintiff (United States of America) pursuant to the above entitled proceedings and that said Edward H. Allen gave his reasons for such testimony. [230]

The defendants Paul Gawzner and Irene Gawzner produced on their behalf the witness Charles G. Frisbie, who was duly qualified as an expert on the valuation of real property and leasehold interests and shown to have knowledge of the property involved and other pertinent facts in connection therewith.

That said Charles G. Frisbie testified that said lease dated December 15, 1943, had no bonus or market value on July 10, 1944, and particularly that said lease had no market or bonus value for the period that the premises were occupied by the plaintiff (United States of America) pursuant to the above entitled proceedings and that said Charles G. Frisbie gave his reasons for such testimony.

That said testimony was undisputed and uncontradicted.

IX.

That the said Edward H. Allen and the said Charles G. Frisbie each testified that in their opinion the rental value of the premises owned by the defendants Paul Gawzner and Irene Gawzner not covered by said lease dated December 15, 1943, for the period of July 10, 1944, to June 1, 1946, (i.e. for the period of the Government's occupancy of said premises pursuant to the above entitled action) was the sum of \$10,950. That said testimony was undisputed and uncontradicted. The defendant Leo Lebenbaum offered no evidence on this issue and his counsel conceded the evidence to be true that said rental value was \$10,950.

X.

The defendant Leo Lebenbaum offered no testimony or evidence as to the market value or bonus value of the lease dated December 15, 1943, for the period of time that the Government occupied said premises. [231]

XI.

That there was received in evidence as direct testimony offered on the part of defendant Leo Lebenbaum and over the objection of the defendants Paul Gawzner and Irene Gawzner a financial statement of the operations of said defendant Leo Lebenbaum as lessee of said Miramar Hotel and Bungalows for the period from January 1, 1944, to July 15, 1944, which said statement, among other things,

disclosed the gross receipts, costs of operation and profits of said defendant Leo Lebenbaum in the operation of said hotel during said period. A motion to strike said statement from evidence made by the defendants Paul Gawzner and Irene Gawzner was denied by the Court. That said financial statement was admitted in evidence in the within proceedings as defendant Leo Lebenbaum's Exhibit A and by said reference is included herein and made a part hereof as if herein set out in full.

XII.

That there was received in evidence as direct testimony offered on the part of defendant Leo Lebenbaum and over the objection of the defendants Paul Gawzner and Irene Gawzner a report showing the estimated profit and loss for the assumed operation of said Miramar Hotel and Bungalows for the year of July 10, 1944, to July 10, 1945, (being a portion of the time the plaintiff (United States of America) was in possession of said premises pursuant to the within entitled condemnation proceedings). Said report, among other things, disclosed an estimated profit and loss statement for the assumed operation of the rooms department; an estimated profit and loss statement for the assumed operation of the food department; an estimated profit and loss statement for the assumed operation of the beverage department; an estimated profit and loss statement for the assumed operation of the beach club; an estimated [232] rent calculation

upon the foregoing assumed operations based upon the estimated gross income of said departments; and an estimated combined profit and loss statement of the assumed operations of said hotel showing the estimated profit to the lessee from the operation of said hotel.

Said report was admitted to be speculative by the witness who prepared it. A motion to strike said report from evidence made by the defendants Paul Gawzner and Irene Gawzner was denied by the Court. That said report was admitted in evidence in the within proceedings as defendant Leo Lebenbaum's Exhibit B and by said reference is included herein and made a part hereof as if herein set out in full.

That there was received in evidence as direct testimony offered on the part of the defendant Leo Lebenbaum and over the objection of the defendants Paul Gawzner and Irene Gawzner the testimony of the witness Pettegrew, who had prepared said report (defendant Lebenbaum's Exhibit B), that the same rate of operation or approximately the same rate of operation as was shown in said Exhibit B would be continued from the period of July 10, 1945, to June 1, 1946. A motion to strike said testimony from evidence made by the defendants Paul Gawzner and Irene Gawzner was denied by the Court.

XIII.

The undisputed and uncontradicted evidence shows that the defendants Paul Gawzner and Irene

Gawzner received as rental for said Miramar Hotel and Bungalows under the terms of said lease dated December 15, 1943, an average of \$5,000 per month during the period from January 1, 1944, to July 10, 1944. [233]

XIV.

That during the trial of the within issues it was stipulated by the defendants Paul Gawzner and Irene Gawzner, on the one hand, and the defendant Leo Lebenbaum, on the other hand, that the portion of the award fixed and determined by the Judgment in the within cause dated November 26, 1946, that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, was the sum of \$91,296.00, and that said sum was the amount agreed upon to restore the premises into the condition that they were in as of July 10, 1944, when the plaintiff (United States of America) took possession of said premises pursuant to the above entitled proceedings and that said sum would cover all items of ordinary wear and tear during the period of the Government's occupancy.

That it was further stipulated between said defendants Paul Gawzner and Irene Gawzner, on the one hand, and defendant Leo Lebenbaum, on the other hand, that there should be paid out of the funds on deposit in the Registry of the Court from that portion of the Judgment allocated to the restoration, repair and replacement of the property condemned, both real and personal, by the aforesaid

stipulation, to wit, out of the sum of \$91,296.00, to the defendants Paul Gawzner and Irene Gawzner the sum of \$80,796.00 and to the defendant Leo Lebenbaum the sum of \$10,500.00 and that upon the payment out of the Registry of the Court of said sums the said defendants Paul Gawzner and Irene Gawzner, on the one hand, and the said defendant Leo Lebenbaum, on the other hand, should waive any further contentions in the above entitled action in reference to said sum of \$91,296.00 allocated to the restoration, repair and replacement of the property condemned, both real and personal, and it was further stipulated that upon the payment of the funds out of the Registry of [234] the Court to said parties, as aforesaid, that said stipulation should be conclusive between said parties as to their rights to that portion of the award made in the above entitled action allocated pursuant to stipulation of said parties to the restoration, repair and replacement of the property condemned in said action, both real and personal, but should be without prejudice to the rights of any said parties to assert and maintain in the above entitled action any and all claims which they had theretofore advanced, or might thereafter advance, in said litigation in reference to the remaining portion of said total award.

That said stipulation was made on the 5th day of June, 1947, was approved by the Court on June 6, 1947, and the Court on June 6, 1947, ordered the

payment out of the Registry of the Court from the amounts deposited in the above entitled action of the sum of \$80,796.00 to the defendants Paul Gawzner and Irene Gawzner and the sum of \$10,500.00 to the defendant Leo Lebenbaum; that said stipulation and order were filed on the 6th day of June, 1947, and by said reference are included herein and made a part hereof as if herein set out in full.

That by said Order the Court retained jurisdiction of the above entitled proceedings to determine the amount of the interests of said parties in and to the compensation ordered to be paid by the plaintiff (United States of America) in the above entitled cause by the Interlocutory Judgment made and entered November 26, 1946, which remained after the payment of said sum of \$91,296.00 to the parties in the amounts hereinabove set forth.

XV.

That the defendants Paul Gawzner and Irene Gawzner during the trial, by evidence, by objections, by motions to strike, by oral arguments and briefs, and prior to the entry of the Court's [235] Memorandum of Conclusions, Findings of Fact, Conclusions of Law and Judgment, made known to the Court the action which said defendants Paul Gawzner and Irene Gawzner desired the Court to take with respect to each of the matters thereafter ruled upon by the Court during the trial and ruled in the Court's Findings of Fact and Conclusions

of Law and discussed in the Court's Memorandum of Conclusions.

Conclusions of Law

From the foregoing Findings of Fact the Court concludes:

I.

That the above entitled action is an action in Eminent Domain arising under the laws of the United States and this Court has jurisdiction of the original cause of action and of the subject matter of the within cause and of the parties thereto.

II.

That the lease dated December 15, 1943, between the defendants Paul Gawzner and Irene Gawzner, as lessors, and the defendant Leo Lebenbaum, as lessee, of the premises commonly known as the Miramar Hotel and Bungalows, was not cancelled and terminated by the institution of the within entitled condemnation proceedings and the giving of the Notice of Termination of Lease, referred to in Paragraph V of the Findings of Fact, or otherwise.

III.

That the defendants Paul Gawzner and Irene Gawzner are not entitled to the payment of the entire award in the within proceedings pursuant to the provisions of Paragraph Ten of said lease dated December 15, 1943. [236]

IV.

That a just and equitable division of the remain-

der of the sum originally deposited in the Registry of the Court is as follows:

To the defendants Paul Gawzner and Irene Gawzner the sum of \$69,344.00.

To the defendant Leo Lebenbaum the sum of \$44,360.00.

From the sum adjudged due the defendants Paul Gawzner and Irene Gawzner there shall be deducted \$1,594.02 as heretofore withdrawn from the Registry of the Court and from the sum adjudged due the defendant Leo Lebenbaum there shall be deducted the sum of \$1,672.23 as having been paid by the plaintiff (United States of America) directly to the defendant Leo Lebenbaum and deducted from the amount paid into the Registry of the Court pursuant to said Judgment of November 26, 1946.

That the parties to this proceeding shall each bear their own costs.

V.

Dated this day of, 1948.

.....,

U. S. District Judge.

[Not signed.]

[Lodged]: April 18, 1949.

Affidavit of service by mail. [237]

[Title of District Court and Cause.]

MEMORANDUM RE PROPOSED FINDINGS
OF FACT AND CONCLUSIONS OF LAW

On August 25, 1948, we filed our memorandum

of conclusions in this matter and requested that counsel for defendants each present proposed findings of fact and conclusions of law and judgment in accordance with such memorandum within twenty days thereafter. On or about September 27, 1948, counsel for defendants Paul Gawzner and Irene Gawzner filed proposed findings of fact and conclusions of law and judgment; counsel for defendant Leo Lebenbaum have not complied with the request of the Court, but in a letter dated October 6, 1948, stated, in effect, that such counsel were unable to propose such findings of fact, etc. for the reason that their views were at variance with those of the Court, and suggested the inclusion of certain findings mentioned in said letter; no objections to the proposed [239] findings, etc. presented by counsel for defendants Gawzner were made by counsel for defendant Lebenbaum, but objections to the findings suggested in the letter above mentioned were made by counsel for defendants Gawzner.

No findings proposed by either counsel were in accordance with the opinion filed by the Court herein, with the exception of findings included in those proposed by counsel for defendants Gawzner as to matters already admitted by the parties.

The Court therefore found itself in the position of having rendered an opinion with which none of the parties concerned agree; the necessity of preparing findings without assistance of counsel suggested the advisability of a complete review by the Court of the matters in the record upon which the

Court had based its said opinion, and such review has been made.

Considerable time has elapsed between the rendition of our opinion and the filing of our findings of fact, conclusions of law and judgment; such delay has been occasioned by the complex nature of the problems involved in this cause, the inability of counsel to assist the Court in the preparation of the findings of fact and conclusions of law, and the demands upon the Court's time for the hearing and considering of criminal cases, petitions for injunctions and other matters having priority.

On this date the Court has completed and filed its findings of fact and conclusions of law and judgment; copies are being mailed to counsel, and counsel are reminded of the provisions of Rule 52, F.R.C.P. Section 6 concerning motions for amended findings.

Dated this 15 day of April, 1949.

/s/ JACOB WEINBERGER,
U. S. District Judge.

[Endorsed]: Filed April 15, 1949. [240]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial before the above entitled Court, the Honorable Jacob Weinberger, Judge presiding without a jury,

on March 18, 1947, for the determination and adjudication of the distribution of the award made by the judgment and decree in condemnation made and entered in the above entitled cause on the 26th day of November, 1946, the defendants Paul Gawzner and Irene Gawzner appearing by and through their attorneys Hill, Morgan & Farrer by Stanley S. Burrill, Esquire, and the defendant Leo Lebenbaum appearing by and through his attorneys Paul R. Cote and Thos. H. Hearn by Thos. H. Hearn, Esquire, and evidence, both oral and documentary, having been introduced by testimony of witnesses and by [241] stipulations between the parties, and the cause having been argued, both orally and by written briefs, and the cause being thereafter submitted to the Court for decision, and the Court having made and filed its memorandum of conclusions on August 25, 1948;

And the Court being fully advised in the premises hereby makes and files its findings of fact and conclusions of law.

Findings of Fact

1.

That the original complaint herein was filed July 10, 1944, in the above entitled action which is an action in eminent domain instituted by the United States of America to condemn an estate or interest for a term of years commencing July 10, 1944, and ending June 1, 1946, in and to that certain property, both real and personal described in the third amended complaint filed October 23, 1946, which property consists of approximately twenty-one

acres of land in Santa Barbara County, California, bounded on the North by U. S. Highway 101 and on the South by 750 feet of beach frontage on the Pacific Ocean, and improvements thereon and all personal property located on said lands and used in connection with the operation of the hotel situated thereon, excepting foods and beverages, property of guests, and accounting records, together with the right to remove within a reasonable time after the expiration of the term or extension thereof, any and all improvements and structures placed thereon, by or for the United States.

2.

That defendants Paul Gawzner and Irene Gawzner were, at all times material to these proceedings, the owners in fee of the property described in the third amended [242] complaint, and defendant Leo Lebenbaum was at all such times the lessee from said owners of a portion of said property generally known as the Miramar Hotel, consisting of hotel buildings, furniture and furnishings and beach frontage; the property not under lease consisted of beach frontage, vacant land, and land improved by a garage.

3.

The lease heretofore mentioned is dated December 15, 1943, and covers a period of five years from date, with option for renewal for an additional five years. By the terms of said lease, the premises are to be used only for the purpose of carrying on the business of a hotel, and related activities; the

rent is fixed at 35% of the gross business from rental of rooms; 15% of the gross of business from sales of liquors, etc.; 5% of the gross business from the sale of food; a minimum rental of \$1500 per month is guaranteed; the lessors covenant to keep the roof, foundations, structural supports and outer walls of all buildings in good repair; all other costs of upkeep, repair, replacement of the leased property, including the care of lawns, shrubbery, etc., being the obligation of the lessee; the lessee is required to deposit \$20,000 in a bank, which fund is to be drawn upon by the parties for the purpose of making permanent improvements, which are to become the property of the lessor; the lessee is required to deposit monthly a sum equal to 3% of the gross business from rental of rooms, and sales of liquors, to the extent of \$3,000 per year to be used as a replacement fund for the personal property so leased; to the end that upon the termination of the lease, the lessors shall receive back furniture, furnishings and other personal property of as good character and value as at the beginning of the lease; that any other [243] furniture provided by the lessee for use shall remain the property of the lessor upon the termination of the lease; that the lessors shall keep insurance of not less than \$100,000 on the improvements and not less than \$60,000 on the personal property, and shall pay all taxes levied upon the leased premises; that upon the termination of the lease, the lessee will surrender the premises to the lessors in as good order and condition as

the same were at the commencement of the term, reasonable use and wear thereof and damage by the elements excepted.

4.

The lease heretofore mentioned also provided that while the same does not cover said garage building, the lessee is given the right to use the same rent free for guests of the hotel, and further provides that in the event the lessor shall elect to improve and alter the building so that it may be used as a motion picture theatre, etc., or any other type of amusement center, the lessor shall, as part of the improvement, so alter the basement of the garage building, so that it may be used as a garage by the lessee, rent free, and that after such improvement, the lessor shall be free to operate, lease or contract for the use of the main floor of said garage, provided the same shall not be operated in a manner to compete with or be detrimental to the lessee.

5.

That Paragraph X of said lease provides as follows:

“Ten: Condemnation. The Lessee has heretofore been informed and knows that the State of California has heretofore acquired from Lessors, by deed recorded in Book 552, Page 275, Official Records of Santa [244] Barbara County, California, and is the owner of, a strip of land adjoining U. S. Highway 101 which is presently being used by Lessors for hotel purposes but which may ulti-

mately be put to highway uses by the State of California. In the event the State of California or the County of Santa Barbara or any other public body shall by condemnation acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the lessors, but Lessors shall pay any and all assessments levied in any such condemnation proceeding. In the event any such condemnation suit shall include any buildings upon said leased premises, said Lessors, at their sole cost and expense, shall relocate the same upon said leased premises in some place mutually agreeable. Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other."

6.

That on July 10, 1944, the plaintiff entered into possession of the property described in said third amended complaint, which property will hereinafter be designated as the property involved herein, and thereafter, and until June 1, 1946, occupied and used said property, including the [245] upper portion, or main floor of the garage, as a Redistribution Station and for related military purposes.

7.

That the respective defendants have made their appearances in said condemnation proceedings, and by their respective answers each has asserted a claim to compensation to be paid for the use of the property condemned.

8.

That on August 4, 1944, a notice of termination of lease was served upon Leo Lebenbaum as lessee by Paul and Irene Gawzner as lessors which notice purported to cancel and terminate said lease upon the ground that the institution of the within proceedings and the taking of possession of said premises pursuant to the above entitled proceedings gave to said lessors the right to terminate said lease pursuant to the terms thereof.

9.

That on November 26, 1946, a stipulation was entered into by and between the United States of America and the defendants herein which provided for the entry of a judgment upon certain terms and conditions therein set forth, and in which stipulation the parties to the condemnation proceedings agreed to certain facts. The pertinent portions of said stipulation are as follows:

III.

That judgment may be forthwith entered herein in which there is condemned and vested in the United States of America an estate or interest in the property, both real and personal, hereinafter described, for a term of years commencing July

10, 1944, and ending June 1, 1946; subject, however, to existing [246] easements for public roads and highways, for public utilities, for railroads, and for pipe lines, and upon the following terms and conditions, to-wit:

(a) That the purpose for which such real and personal property (hereinafter described) shall be used by plaintiff is for use for the establishment of a Redistribution Station and related military purposes;

(b) That the sum of \$205,000, without interest, except as hereinafter provided, is the fair, just and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in subparagraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same condition as it was when it was received by the plaintiff from the defendants. reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration; * * *

(d) That the right heretofore reserved by plaintiff to remove any and all improvements and structures placed on the hereinafter described real property by it [247] within a reasonable time after July 1, 1946, as provided, set forth, and reserved

in Paragraph IX of its Third Amended Complaint, is hereby waived, surrendered, and released unto and in favor of whomsoever the Court shall find and determine is the legal owner of such premises.

IV.

That if competent witnesses were sworn and testified, their testimony would be that the sum of \$205,000, without interest, together with the surrender of plaintiff's right to remove improvements and structures placed upon said premises by it and the vesting of title thereto in the legal owner of said premises, constitutes fair, just and adequate compensation to be paid by plaintiff to the parties entitled thereto for the taking of the estate and interest described in Paragraph III in the real and personal property hereinafter described in Paragraph V, together with full satisfaction of all damages which have accrued, or will accrue, by reason of the plaintiff's failure to make restoration, as more particularly set forth and described in subparagraph (b) of Paragraph III. * * *

VI.

That this Court shall retain jurisdiction to determine the amount of the interests of all parties who have appeared in this proceeding, and who may hereafter appear herein, if any, in and to the compensation which shall be ordered paid by the plaintiff in the judgment to be filed [248] pursuant to this Stipulation, the same as though a jury had rendered a verdict for said sum of \$205,000, without interest, as their total award for all interests taken

by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, excepting that defendant, Leo Lebenbaum, shall be deemed to have received upon account of any compensation found to be due him, payment of the sum of \$1,672.23. * * *

10.

That pursuant to such stipulation for judgment, a judgment and decree of condemnation was entered in such condemnation proceedings which judgment is dated November 26, 1946. The pertinent portions of said judgment are as follows:

“It Is Hereby Ordered, Adjudged and Decreed:

I.

That there be and is hereby condemned and vested in the United States of America an estate or interest in the property, both real and personal, hereinafter described, for a term of years commencing July 10, 1944, and ending June 1, 1946; subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, and upon the following terms and conditions, to-wit:

(a) That the purpose for which such real and personal property (hereinafter described) shall be used by plaintiff is for use for the establishment of a Redistribution [249] Station and related military purposes;

(b) That the sum of \$205,000, without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in subparagraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and personal property so taken by it to the same conditions as it was when it was received by the plaintiff from the defendants, reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration; provided, however, that the deficiency provided for and set forth in subparagraph (c) herein shall have been paid into the Registry of this Court on or before January 5, 1947; otherwise, and in the event that default be made in the deposit of such deficiency on or before such date, such deficiency shall draw interest commencing January 6, 1947 at the rate of six per cent per annum, such interest to continue until the payment and deposit of the full amount thereof into [250] the Registry of this Court; * * *

(d) That the right heretofore reserved by plaintiff to remove any and all improvements and structures placed on the hereinafter described real property by it within a reasonable time after July 1,

1946, as provided, set forth, and reserved in Paragraph IX of its Third Amended Complaint, is hereby waived, surrendered, and released unto and in favor of whomsoever the Court shall find and determine is the legal owner of such premises. * * *

III.

The Court retains jurisdiction hereof to determine the amount of the interests of all parties who have appeared in this proceeding, and who may hereafter appear herein, if any, in and to the compensation which is hereby ordered paid by the plaintiff herein, the same as though a jury had rendered a verdict for said sum of \$205,000, without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, * * *''

11.

That on June 1, 1946, the plaintiff returned to Leo Lebenbaum and he accepted the possession of that portion of the premises it had occupied which was covered by the aforementioned lease, and also on said date plaintiff returned to Paul and Irene Gawzner and they accepted the [251] possession of that portion of the premises it had occupied not covered by said lease.

12.

That prior to July 10, 1944, the lessors and the lessee had performed their respective obligations under the lease, and the sum of \$20,000.00 deposited by the lessee had been expended, with the exception of \$16.95, in the manner provided by the lease, prior to said date.

13.

That during the period beginning July 10, 1944, and ending June 1, 1946, the lessee paid no rent to the lessors under the terms of the lease, or at all, and the lessors refused to accept any rent from said lessee during said period.

14.

That no repairs to the roof, foundations, structural supports and outer walls of the buildings on the leased premises were made by the lessors during the period of occupancy of the plaintiff; that no deposits into the replacement fund were made by the lessee during said period, and none of the other obligations imposed upon the lessee under the terms of the lease were performed by him during said period.

15.

During the trial of the proceeding concerning the determination and adjudication of the distribution of the amount paid by the plaintiff pursuant to said stipulation for judgment and judgment and decree of condemnation, an oral stipulation was made in open court between the lessors and the lessee as follows:

“It is stipulated that the portion of the award made [252] by the judgment of November 26, 1946, in the within cause, that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of \$91,296.”

16.

That by the said stipulation for judgment it was agreed that the surrender by plaintiff of its right to remove improvements and structures placed upon the premises and the vesting of title thereto in the legal owner of the premises was part of the compensation furnished by the plaintiff, in addition to the sum of \$205,000; that no evidence was introduced whereby the Court can make a finding concerning the value of these improvements and what, if anything, these improvements added to the money compensation paid by the plaintiff.

17.

That by the said stipulation for judgment it was agreed that the consideration furnished by plaintiff included compensation for damages arising out of any failure or default upon the part of the plaintiff in performance of its obligation to restore such premises and the real and personal property so taken by it to its same condition as when received by the plaintiff, reasonable wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration; that no evidence was introduced from which the

Court can make a finding concerning the time which was required for the completion of such restoration, or whether compensation therefor was included in the sum of \$91,296, or, whether, if so included, such compensation was allocated by subsequent [253] agreements or stipulations to the lessors or to the lessee, or whether a portion of the sum remaining for division includes such compensation.

18.

That the wear and tear suffered by the premises while the same were occupied by the plaintiff was greater than that which would have been occasioned had the property been used by an ordinary lessee under the terms of the lease, and the cost of restoration replacement and repair necessitated by the occupancy of the plaintiff exceeded the cost of any maintenance which would have been required of an ordinary lessee under the terms of the lease, but no evidence was introduced whereby the Court can make a finding as to the extent of such excess wear and tear or as to the amount of such excess costs.

19.

That since June 1, 1946 and prior to the beginning of the trial of the proceedings for the division of the award, to-wit, March 18, 1947, and during said trial, and prior to June 6, 1947, both the lessors and the lessee had expended monies which each claimed to have expended in making the restoration, replacement and repair contemplated by the provisions of the stipulation for judgment and judgment and decree aforementioned, and esti-

mates were introduced in evidence as to the cost of completing such restoration, replacement and repair, but in many of the single estimates there were included in one sum items which, by the provisions of the lease, were obligations of the lessors, and items which likewise were the obligations of the lessee, and no evidence was introduced whereby such proportionate cost could be determined, and it likewise appeared that in [254] some instances the lessors had paid for the restoration, etc., of items properly chargeable under the provisions of the lease to the lessee, and that the lessee had in some instances paid for restoration, etc., of items properly chargeable under the provisions of the lease to the lessors, but no evidence was introduced whereby the Court could make a finding as to what portion of the funds expended by the lessors or the lessee in such matters were properly chargeable to the other defendants or defendant.

That as to some items, restoration, etc., to the leased premises was made to an extent beyond that necessary to restore the same to their condition as of the beginning of the lease, and to such an extent as to relieve either the lessee or the lessor, or both, of some of their respective obligations of maintenance under the lease for a period beyond that of the plaintiff's occupancy, which last mentioned restoration, etc., was not properly chargeable as restoration, repair and replacement occasioned by the occupancy of the premises by the plaintiff, but there is no evidence from which the Court can

make a finding as to the cost of such excess restoration, repair and replacement, and there is no evidence from which the Court can make a finding as to what portion of the fund was used, or should have been used, for the restoration, repair and replacement of the premises not under lease.

20.

That on June 6, 1947, the lessors and the lessee entered into a written stipulation whereby the said sum of \$91,296.00 was divided between them, \$80,796.00 being paid to defendants Gawzner and \$10,500.00 to defendant Lebenbaum; by said stipulation it was provided that such allocation [255] should be conclusive as to the claim of each of the defendants to that portion of the fund allocated to the restoration, replacement and repair of the property condemned, both real and personal; that no evidence was introduced from which the Court could determine the basis upon which the defendants made the division mentioned in said stipulation; that the sum of \$80,796.00, paid to defendants Gawzner, included compensation for making some of the restoration, etc., of items, which under the provisions of the lease it was the obligation of defendant Lebenbaum to maintain, and there was also included in said last mentioned sum compensation which relieved defendant Lebenbaum from making any deposit for replacement under the terms of the lease for a period extending beyond the period during which the plaintiff occupied the premises, but no evidence was introduced from which the Court can make a

finding as to the extent or cost of the items mentioned in this paragraph.

21.

That after deducting the sum of \$91,296.00 withdrawn by the defendants as aforesaid, there remains of the award of \$205,000.00 the sum of \$113,704.00. The lessors on the one hand claim that all of said sum is due them as compensation for the use of the premises leased and those not under lease, and the lessee, on the other hand, claims that he is entitled to all the compensation paid for the use of the leased premises.

22.

That said sum of \$113,704.00 remaining does not represent a sum which, under the stipulation for judgment and judgment and decree can be found to be the entire compensation for the use of the premises which was paid for [256] such purpose by the plaintiff and accepted by defendants under the said stipulation for judgment and judgment and decree, for the reason that said sum has been depleted by the withdrawal by defendants of an amount part of which has been used for the making of restoration, replacement and repair to the leased premises to an extent greater than that contemplated by the said stipulation for judgment and judgment and decree; that no evidence has been introduced from which the court can make a finding as to what extent the fund properly referable to compensation for the use and occupancy of the premises has been depleted as above mentioned, or to what extent

said fund has been depleted for the purpose of relieving the defendants of some of their respective obligations under the lease for a period extending beyond that of the occupancy by plaintiff.

23.

That the fair market rental value for the occupancy of the upper portion of said garage during the period beginning July 10, 1944 and ending June 1, 1946, is the sum of \$4412.00.

24.

That the fair market rental value for the occupancy of the land not under lease during the period beginning July 10, 1944, and ending June 1, 1946, is the sum of \$6088.00.

25.

That the highest and best use of the leased property involved herein, was, as of the date of July 10, 1944, the operation of a resort hotel, and activities connected therewith. [247]

26.

That on *July, 1944*, there was no hotel resort property comparable to the leased premises, at or near the vicinity of said premises, which was available for lease, either by taking a new lease, or the purchase of an existing lease, and there had been no sales of leases on similar hotels at or near said date.

27.

That the leased premises were operated as a resort hotel by defendant Lebenbuam for a period

of six months immediately prior to the occupation of said premises by the plaintiff; that during such period, there was paid to the lessor, as rent, a percentage of the gross receipts of the lessee which was about three times the net profit derived by the lessee; that the lessee during said six months period, expended monies for pre-opening expenses over twice as much as would be required during a like period of normal operation of such hotel; that the six months period of operation represented a "slack season" in resort hotel operation, and at the date plaintiff entered upon its occupancy of the leased premises, there was a demand by purchasers for resort hotels; that on such date an increase in the receipts from the operation of the various departments of said leased premises reasonably could have been foreseen, and a decrease in the proportionate cost of operation of such departments reasonably could have been foreseen, and a lessee, on July 10, 1944, would have been justified in expecting that his profits, during the period ending June 1, 1946, would bear a larger ratio to the rental paid, than during the preceding six months.

28.

That there is no competent evidence from which the [258] Court can make a finding as to the fair market rental value of the use and occupancy of the leased premises for the period involved in the condemnation proceedings based upon considerations of what a willing lessee would have paid to a willing lessor on July 10, 1944, as rental for said leased

premises for use as a resort hotel for said period, and there is likewise no competent evidence from which the Court can make a finding based upon considerations of what a willing sub-lessee would have paid for the right to sublet the leased premises for said purpose for said period.

29.

That the Court is unable to make a finding as to the respective interests of the defendants in the fund remaining for distribution based upon the market rental value of the premises condemned, for the reason, in addition to those set forth in its memorandum of conclusions of August 25, 1948, that the defendants, in their stipulation with plaintiff, have fixed the compensation for their interests on the condition of a different use than the highest and best use of the property condemned. [259]

Conclusions of Law

From the foregoing findings of fact the Court concludes:

1.

That the above entitled action is an action in eminent domain arising under the laws of the United States and this Court has jurisdiction of the original cause of action and of the subject matter of the within cause and of the parties thereto.

2.

That the lease dated December 15, 1943, between the defendants Paul Gawzner and Irene Gawzner, as lessors, and the defendant Leo Lebenbaum, as

lessee, of the premises commonly known as the Miramar Hotel and Bungalows, was not cancelled and terminated by the institution of the within entitled condemnation proceedings and the giving of the notice of termination of lease.

3.

That Leo Lebenbaum and Paul and Irene Gawzner are the only persons entitled to the fund deposited in the Registry of this Court by the plaintiff pursuant to said stipulation and judgment and decree of condemnation.

4.

That the defendants Paul Gawzner and Irene Gawzner are not entitled to the payment of the entire award in the within proceedings.

5.

That the defendant Leo Lebenbaum is not entitled to the payment of the entire award in the within proceedings. [260]

6.

That the lessee has not defaulted in his obligation to pay rent on the leased premises during the period beginning July 10, 1944 and ending June 1, 1946.

7.

That a just and equitable division of the remainder of the sum originally deposited in the Registry of the Court is as follows:

To the defendants Paul Gawzner and Irene Gawzner the sum of \$69,344.00.

To the defendant Leo Lebenbaum the sum of \$44,360.00.

From the sum adjudged due the defendants Paul Gawzner and Irene Gawzner there shall be deducted \$1,594.02 as heretofore withdrawn from the Registry of the Court and from the sum adjudged due the defendant Leo Lebenbaum there shall be deducted the sum of \$1,672.23 as having been paid by the plaintiff directly to the defendant Leo Lebenbaum and deducted from the amount paid into the Registry of the Court pursuant to said Judgment of November 26, 1946.

8.

That the monies awarded the respective defendants herein, together with the consideration expressed in the stipulations entered into between the parties since the filing of the condemnation action, constitute full satisfaction of all claims of the parties arising by virtue of the condemnation proceedings, and of all claims arising [261] between the lessors and the lessee by virtue of the lease during the period of the occupancy of the leased premises by the plaintiff, including any claim of the lessors against the lessee for rental under the lease during said period.

9.

That the parties to this proceeding shall each bear their own costs.

Dated this 15th day of April, 1949.

/s/ JACOB WEINBERGER,
U. S. District Judge.

[Endorsed]: Filed April 15, 1949. [262]

[Title of District Court and Cause.]

JUDGMENT UPON DISTRIBUTION OF
AWARD PROVIDED FOR BY JUDGMENT
AND DECREE IN CONDEMNATION

The above entitled cause came on regularly for trial before the above entitled Court, the Honorable Jacob Weinberger, Judge presiding without a jury, on March 18, 1947, for the determination and adjudication of the distribution of the award made by the Judgment and Decree in Condemnation made and entered in the above entitled cause on the 26th day of November, 1946, the defendants Paul Gawzner and Irene Gawzner appearing by and through their attorneys Hill, Morgan & Farrer by Stanley S. Burrill, Esquire, and the [263] defendant Leo Lebenbaum appearing by and through its attorneys Paul R. Cote and Thos. H. Hearn by Thos. H. Hearn, Esquire, and it appearing to the Court that no other person, firm or corporation has appeared herein as to this issue of the above entitled cause or has made any claim or has any claim in and to the compensation paid by the plaintiff herein pursuant to the aforesaid judgment made and entered on November 26, 1946, and evidence, both oral and documentary, was offered and introduced by and on behalf of said defendants Paul Gawzner and Irene Gawzner and by and on behalf of said defendant Leo Lebenbaum and the cause was argued, both orally and by written briefs, and the cause was thereafter submitted to the Court for decision

and the Court having made its Memorandum of Conclusions on August 25, 1948, and the Court having heretofore signed and filed its Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Ordered, Adjudged And Decreed:

I.

That a just and equitable division of the remainder of the sum originally deposited in the Registry of the Court is as follows:

To the defendants Paul Gawzner and Irene Gawzner the sum of \$69,344.00.

To the defendant Leo Lebenbaum the sum of \$44,360.00.

From the sum adjudged due the defendants Paul Gawzner and Irene Gawzner there shall be deducted \$1,594.02 as heretofore withdrawn from the Registry of the Court and from the sum adjudged due the defendant Leo Lebenbaum there shall be deducted the sum of \$1,672.23 as having been paid by the plaintiff (United States of America) directly to the defendant Leo Lebenbaum and deducted from the amount paid into the Registry of the Court pursuant to said Judgment of November 26, 1946.

II.

That the clerk of the above entitled Court shall forthwith pay out of the Registry of this Court from the amounts deposited in the above entitled action the following sums to the following persons:

To Paul Gawzner and Irene Gawzner, jointly, the sum of \$67,749.98.

To Leo Lebenbaum the sum of \$30,187.77.

To Paul Gawzner and Irene Gawzner, jointly, pursuant to that certain stipulation and assignment of interest in award dated July 23, 1946, executed by Leo Lebenbaum, Paul Gawzner and Irene Gawzner, which said stipulation and assignment was filed in the above entitled proceedings December 12, 1946, the sum of \$12,500.00.

III.

The within judgment shall finally adjudicate all controversies arising between the parties to these condemnation proceedings and all controversies arising between the defendants by virtue of the lease dated December 15, 1943, during the period beginning July 10, 1944 and ending June 1, 1946.

IV.

The parties to these proceedings shall bear their own costs.

Dated this 15th day of April, 1949.

/s/ JACOB WEINBERGER,
U. S. District Judge.

Judgment entered April 15, 1949.

Docketed April 15, 1949.

[Endorsed]: Filed April 15, 1949. [265]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Paul Gawzner and Irene Gawzner, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from those portions of the Judgment Upon Distribution of Award entered in this action on April 15, 1949, which adjudge that a just and equitable division of the remainder of the sum originally deposited in the Registry of the Court requires the allocation to defendant Leo Lebenbaum of the sum of \$44,360.00, or of any amount whatsoever, and fail to adjudge a cancellation of that certain Lease dated December 15, 1943, described in the Findings of Fact and Conclusions of Law herein; which order the Clerk of the Court to pay out to defendant, Leo Lebenbaum, the sum of \$30,-187.77, or any amount whatsoever, from said sum in the Registry [266] of the Court; and which require defendants, Paul Gawzner and Irene Gawzner, to bear their own costs.

HILL, MORGAN & FARRER

By /s/ ROBERT NIBLEY,

Attorneys for Defendants,

Paul and Irene Gawzner.

[Endorsed]: Filed April 28, 1949.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL AND TO
STAY EXECUTION

Whereas, Paul Gawzner and Irene Gawzner appellants in the above entitled action have appealed to the Circuit Court of Appeals, 9th Circuit of the State of California, from a judgment made and entered on the 15th day of April, 1949, in the said United States District Court; and whereas said appellants desires to appeal from that portion of said judgment awarding, Leo Lebenbaum, respondent, the sum of \$30,187.87 and from that portion of said judgment which requires said Paul and Irene Gawzner to bear their own costs;

Whereas, the Appellants are desirous of staying the execution of the said portions of the judgment so appealed from,

Now, Therefore, in consideration of the premises, and of such appeal, the undersigned, Continental Casualty Company, a corporation organized and existing under the laws of the State of Illinois, and having an office and principal place of business at No. 310 South Michigan Avenue, City of Chicago, County of Cook, and State of Illinois, and duly authorized to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant, and does

acknowledge itself justly bound in the sum of Five Thousand Dollars (\$5000.00) that if the said portion of said judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the Appellants will pay respondent the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which may be awarded against the Appellants upon the appeal; and that if the appellants do not make such payment within thirty (30) days after the filing of the remittitur from the said Circuit Court of Appeals in the Court from which the appeal is taken, judgment may be entered in said action on motion of Respondent (and without notice to the undersigned Surety) in Respondents favor against the said Surety, for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the Appellants upon the appeal.

In Witness Whereof, the corporate seal and the name of the said Surety Company is hereto affixed and attested at Los Angeles, California, by its duly authorized officer, this 28th day of April, A.D., 1949.

CONTINENTAL CASUALTY
COMPANY,

[Seal] By /s/ STUART S. ROUGH,
Its Attorney-in-Fact,
Agent.

Examined and recommended for approval, pursuant to Rule 8 F.R.C.P.

Dated April 29, 1949.

/s/ ROBERT NIBLEY. [268]

State of California,
County of Los Angeles—ss.

On this 28th day of April, 1949, before me, H. Handorf, a Notary Public in and for the County and State aforesaid, residing therein, duly commissioned and sworn, personally appeared Stuart S. Rough, known to me to be the person whose name is subscribed to the foregoing instrument as the Attorney-in-fact of the Continental Casualty Company, and acknowledge to me that he subscribed the name of the Continental Casualty Company thereto and his own name as Attorney-in-fact.

[Seal] /s/ H. HANDORF,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires July 25, 1952.

[Endorsed]: Filed May 5, 1949.

[Title of District Court and Cause.]

APPROVAL OF SUPERSEDEAS
AND COST BOND

The within bond has been examined and recom-

mended for approval, as provided in Rule 8. The amount thereof is also approved.

HILL, MORGAN & FARRER

By /s/ ROBERT NIBLEY

I hereby approve the within bond as a Superseedeas and Cost Bond, and direct the Clerk, pending determination of the appeal herein, to withhold payment to defendant, Leo Lebenbaum, of funds from the Court Registry, and to stay further proceedings upon those portions of the judgment in this action appealed from by defendant Paul and Irene Gawzner.

Dated: This 4th day of May, 1949.

/s/ JACOB WEINBERGER,
Judge.

[Endorsed]: Filed May 5, 1949. [269]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Leo Lebenbaum, defendant herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from those portions of that certain Judgment of the above entitled Court, entered in these proceedings on April 15, 1949 in Book 57, page 584 of Judgments wherein the Court adjudges that just and equitable division of the remainder of the sum originally

deposited in the registry of the Court requires allocation to defendants Paul Gawzner and Irene Gawzner, jointly, of the sum of \$69,344, or any sum in excess of \$10,500; which awards to Paul Gawzner and Irene Gawzner, jointly, the sum of \$69,344 and directs the Clerk of the Court to pay said sum to them and which fails to award appellant Leo Lebenbaum a Judgment against Paul Gawzner and Irene Gawzner for his costs and disbursements herein incurred.

/s/ PAUL R. COTE,

Attorney for Leo Lebenbaum.

[Endorsed]: Filed May 13, 1949. [270]

[Title of District Court and Cause.]

COSTS BOND ON APPEAL

Know All Men By These Presents: That, Pacific Indemnity Company, a corporation organized and existing under the laws of the State of California, and duly licensed to transact business in the State of California, is held and firmly bound unto United States of America, Plaintiff, in the above entitled action, in the penal sum of Two Hundred Fifty & No/100 Dollars (\$250.00), for which payment well and truly to be made, the Pacific Indemnity Company binds itself, its successors and assigns, firmly by these presents.

Sealed with our seals and dated this 12th day of May, 1949.

The Condition of the above obligation is such that Whereas, the said Leo Lebenbaum, Defendant in the above entitled cause in the said United States District Court, Southern District of California, Central Division, is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment rendered and entered on the 15th day of April, 1949, by the United States District Court, Southern District of California, Central Division, in the above entitled cause.

Now, Therefore, the condition of the above obligation is such that if Leo Lebenbaum, shall pay all costs taxed against him if the appeal is dismissed or the judgment affirmed, or all such costs as the said Circuit Court of Appeals may award against him if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

The Premium charged for this bond is \$10.00 per annum.

[Seal]

PACIFIC INDEMNITY
COMPANY

By /s/ W. C. BENING,
Attorney-in-Fact. [271]

State of California,
County of Los Angeles—ss.

On this 12th day of May, in the year one thousand nine hundred and forty-nine, before me, Atala M. Carter a Notary Public in and for said County

and State, residing therein, duly commissioned and sworn, personally appeared W. C. Bening known to me to be the duly authorized Attorney-in-Fact of Pacific Indemnity Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-Fact of said Company, and the said W. C. Bening acknowledged to me that he subscribed the name of Pacific Indemnity Company, thereto as surety and his own name as Attorney-in-Fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Notarial Seal]

/s/ ATALA M. CARTER,

Notary Public in and for Los Angeles County,
State of California.

My Commission Expires May 28, 1950.

[Endorsed]: Filed May 13, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Leo Lebenbaum, defendant herein, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from that certain Judgment of the above entitled Court, en-

tered in these proceedings on April 15, 1949 in Book 57, page 584 of Judgments.

Dated: May 16, 1949.

/s/ PAUL R. COTE,

Attorney for Leo Lebenbaum.

[Endorsed]: Filed May 16, 1949. [272]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR EXTENSION OF TIME FOR FILING RECORDS ON APPEAL AND DOCKETING APPEALS

Final Judgment in the above entitled action having been entered on April 15, 1949, and timely notices of appeal from said judgment to the Circuit Court of Appeals for the Ninth Circuit having been filed by defendants Paul Gawzner and Irene Gawzner on April 28, 1949, and by Leo Lebenbaum on May 13, 1949, and on May 16, 1949, and the Court having the power, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, to extend and fix the time for filing said defendants' respective records on appeal and docketing their respective appeals with the said Circuit Court of Appeals, and the said defendants desiring additional time for said filing and docketing [273] due to illness of counsel for defendant Leo Lebenbaum and absence from the city of counsel for defendants Paul Gawzner and Irene Gawzner.

Now, Therefore, It Is Hereby Stipulated by and between defendants Paul Gawzner and Irene Gawzner and defendant Leo Lebenbaum, through their respective counsel, that the time for filing their respective records on appeal and for docketing their respective appeals to the Circuit Court of Appeals for the Ninth Circuit be extended to and including July 7, 1949, and said defendants respectfully request that the Court's order issue accordingly.

Dated: June 3, 1949.

HILL, MORGAN & FARRER,
and
STANLEY S. BURRILL,

By /s/ ROBERT NIBLEY,
Attorneys for Defendant
Paul Gawzner and
Irene Gawzner.

PAUL R. COTE,
By /s/ PAUL R. COTE,
Attorney for Defendant
Leo Lebenbaum.

Good cause appearing therefor, it is hereby ordered that the time within which defendants Paul Gawzner and Irene Gawzner and defendant Leo Lebenbaum may file their respective records on appeal and docket their respective appeals herein with the Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and

including July 7, 1949. This order is made before the expiration of the period for filing and docketing as originally prescribed.

Dated: This 7th day of June, 1949.

/s/ JACOB WEINBERGER,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed June 7, 1949. [274]

[Title of District Court and Cause.]

PERSONAL STAY BOND
(With Cash Deposit)

The undersigned, Leo Lebenbaum, is the owner of the sum of \$2500, lawful money of the United States, which he herewith deposits with the Clerk of this Court pursuant to the order for Stay Bond on Appeal made by the Honorable Jacob Weinberger, United States District Judge, on June 17, 1949, conditioned that he will prosecute to effect his appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain Judgment of this Court entered herein on April 15, 1949 in Book 57, page 584 of Judgments; that if he shall fail to prosecute said appeal to effect, such deposited fund shall answer towards satisfaction of the use and detention of, and interest upon and damages for delay in, the receipt by Paul Gawzner

and Irene Gawzner, jointly, of the sum of \$57,-249.98, being a portion of the sum of \$67,749.98 awarded and directed to be paid by the foregoing Judgment to Paul Gawzner and Irene Gawzner, jointly, together with the costs of the action and costs on appeal, if any, not satisfied by the existing bond heretofore filed herein by the undersigned;

Pursuant to Rule 8(c) of the Local Rules of this Court, in case of the [275] default or contumacy on the part of the undersigned as principal and surety, this Court may, upon notice to the undersigned of not less than ten (10) days, proceed summarily and render judgment against him in accordance with the obligation herein contained and assumed by him and may award execution thereon.

Dated: 6/29, 1949.

/s/ LEO LEBENBAUM.

State of California,
County of Santa Barbara—ss.

On this 29th day of June, 1949, before me, a Notary Public in and for said County and State, duly commissioned and sworn, personally appeared Leo Lebenbaum, known to me to be the person whose name is subscribed to the within Personal Stay Bond, and acknowledged to me that he executed the same.

Witness my hand and seal the day and year first above written.

[Notarial Seal]

/s/ HENRY C. RAY,

Notary Public in and for said County and State.

My Commission Expires Feb. 2, 1953.

Approved as to form:

HILL, MORGAN & FARRER,

By /s/ STANLEY S. BURRILL.

Examined and recommended for approval as provided in Rule 8, this 5th day of July, 1949.

/s/ IRL D. BRETT,

Attorney.

I hereby approve the foregoing this 5th day of July, 1949.

/s/ JACOB WEINBERGER,

United States District Judge.

[Endorsed]: Filed July 5, 1949. [276]

[Title of District Court and Cause.]

STIPULATION AND ORDER FOR EXTENSION OF TIME FOR FILING RECORDS ON APPEAL AND DOCKETING APPEALS

This Court having heretofore made its order in the above entitled action extending time for filing records on appeal and docketing appeals to and including July 7, 1949, and the parties hereto finding that additional time will be required by them to file said records and docket said appeals, owing to the complexity of the matters involved, and

this Court having the power, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, to extend the time for filing defendants' respective records on appeal and docketing their respective appeals for a period of ninety days from the date of filing the first notice of appeal, which said date was April 28, 1949, and ninety days thereafter being July 27, 1949.

Now, Therefore, It Is Hereby Stipulated by and between defendants Paul Gawzner and Irene Gawzner and defendant Leo Lebenbaum, through their respective counsel, that the time for filing their respective records on appeal and for docketing their respective appeals to the Circuit Court of Appeals for the Ninth Circuit be extended to and including July 27, 1949, and said defendants respectfully request that the Court's order issue accordingly.

Dated: June 29, 1949.

HILL, MORGAN & FARRER,
and STANLEY S. BURRILL,

By /s/ ROBERT NIBLEY,

Attorneys for Defendants
Paul Gawzner and
Irene Gawzner.

PAUL R. COTE.

By /s/ PAUL R. COTE.

Attorney for Defendant
Leo Lebenbaum.

Good cause appearing therefor, It Is Hereby Ordered that the time within which defendants Paul Gawzner and Irene Gakzner and defendant Leo Lebenbaum may file their respective records on appeal and docket their respective appeals herein with the Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including July 27, 1949. This order is made before the expiration of the period for filing and docketing as extended by a previous order.

Dated: This 5th day of July, 1949.

/s/ JACOB WEINBERGER,
Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed July 5, 1949. [278]

[Title of District Court and Cause.]

JOINT DESIGNATION AND STIPULATION
FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Entitled Court:

The defendants Paul Gawzner and Irene Gawzner and the defendant Leo Lebenbaum join in this Designation and Stipulation for the preparation of the transcript of the record on appeal in said cause and You Are Hereby Requested and Directed to prepare a transcript of the record in said cause and certify the same to the Clerk of the United States Court of Appeals for the Ninth Circuit at

San Francisco, California, duly authenticated pursuant to the appeal of the defendants Paul Gawzner and Irene Gawzner and the cross appeal of the defendant Leo Lebenbaum in said cause, said transcript to be prepared in accordance with law and any rules of court applicable thereto.

It Is Hereby Stipulated and Agreed by and between defendants and appellants Paul Gawzner and Irene Gawzner and defendant and cross appellant Leo Lebenbaum in the above entitled cause, by and through their respective attorneys of record, that there shall be included in the record and transcript on the appeal of the defendants and appellants Paul Gawzner and Irene Gawzner and on the appeal of the defendant and cross appellant Leo Lebenbaum to the United States Court of Appeals for the Ninth Circuit from the Judgment of the above entitled District Court in the above entitled action entered therein on April 15, 1949, the following parts of the record, proceedings and evidence in said action, which are hereby designated to be included and shall be included in and constitute the record on appeal of both the defendants and appellants Paul Gawzner and Irene Gawzner and the defendant and cross appellant Leo Lebebaum in said cause, to wit: [281]

1. Agreed Statement of Facts attached hereto as Exhibit A.

2. Third Amended Complaint in Condemnation, without inventory of personal property, (filed October 23, 1946).

3. Notice of Motion to File Answer to Third Amended Complaint and Cross Complaint.

4. Answer of Paul Gawzner and Irene Gawzner to Third Amended Complaint and Cross Complaint, without Exhibits A, C and D, (filed March 18, 1947).

5. Answer of Defendant Leo Lebenbaum to Second Amended Complaint, without Exhibit A, (filed November 6, 1945).

6. Order to Deposit Funds in the Amount of \$52,693.55 under Military Appropriations Act (filed March 22, 1945).

7. Memorandum of Conclusions by Honorable Judge Hollzer dated June 30, 1945.

8. Notice of Motion for an Order Directing the Plaintiff to Deliver Possession of Premises to Defendant Leo Lebenbaum filed December 28, 1945.

9. Notice of Opposition to Order Directing the Plaintiff to Deliver Possession of the Premises to the Defendant Leo Lebenbaum filed January 2, 1946.

10. Notice of Motion for an Order Excluding Certain Defendants from Participation in Trial Proceedings filed December 28, 1945.

11. Notice of Motion for an Order Releasing Deposited Funds filed December 28, 1945.

12. Notice of Opposition to Order Releasing Deposited Funds filed January 2, 1946.

13. Memorandum of Conclusions by Honorable Jacob Weinberger dated April 30, 1946.

14. Minute Order of Honorable Jacob Weinberger April 30, 1946.

15. Stipulation between United States of America and Leo Lebenbaum in Re Surrender of Possession of Miramar Hotel, filed June 17, 1946.

16. Receipt for possession of premises executed by Leo Lebenbaum on June 17, 1946.

17. Stipulation between United States of America and Paul Gawzner and Irene Gawzner re Surrender of Possession of Portion of Property taken by the United States filed July 10, 1946.

18. Receipt for Possession of Premises executed by Paul Gawzner and Irene Gawzner filed September 13, 1946.

19. Stipulation re Withdrawal of Funds on Deposit filed August 3, 1946.

20. Petition for Withdrawal of Funds on Deposit filed August 29, 1946.

21. Responsive Statement of Plaintiff in Connection with Defendants' Petition for Withdrawal of Funds on Deposit filed August 29, 1946.

22. Stipulation for Judgment filed November 26, 1946.

23. Judgment and Decree in Condemnation filed November 26, 1946.

24. Stipulation and Assignment of Interest in Award filed December 12, 1946.

25. Stipulation re Payment of Portion of Award and Order for Payment of Funds on Deposit with the Registry of the Court filed June 6, 1947.

26. All testimony and proceedings at all hearings, proceedings and trial on issues between defendants Paul Gawzner and Irene Gawzner and defendant Leo Lebenbaum prepared by the official reports and being transcripts of the proceedings occurring on the following days:

January 17, 1947—pages 1 to 101 inclusive.

February 28, 1947—pages 1 to 18 inclusive.

March 18, 19, 20, 1947—pages 1 to 258 inclusive.

March 21, 1947—pages 259 to 340 inclusive.

April 25, 1947—pages 1 to 59 inclusive.

May 12, 1947—pages 1 to 22 inclusive.

June 6, 1947—pages 1 to 24 inclusive.

August 14, 1947—pages 1 to 38 inclusive.

October 22, 1947—pages 1 to 84 inclusive.

January 23, 1948—pages 1 to 5 inclusive.

27. Stipulation as to Record on Appeal.

28. Defendants Gawzner Exhibit 1 (Lease).

29. Defendants Gawzner Exhibit 2 (Notice of termination).

30. Defendants Gawzner Exhibit 3 (Map).

31. Defendant Lebenbaum's Exhibit A (Horwath & Horwath report).

32. Defendant Lebenbaum's Exhibit B (Pettegrew report).

33. Memorandum of Conclusions filed August 25, 1948.

34. Minute Order of September 20, 1948, Nunc pro tunc as of August 25, 1948.

35. Findings of Fact and Conclusions of Law upon Distribution of Award provided for by Judgment and Decree in Condemnation Proposed and Requested by Defendants Paul Gawzner and Irene Gawzner filed September 27, 1948.

36. Letter dated October 6, 1948, addressed to Honorable Jacob Weinberger, Judge of United States District Court, executed by Paul R. Cote

and Thos. H. Hearn by Thos. H. Hearn re proposed Findings. [285]

37. Letter dated October 13, 1948, addressed to Honorable Jacob Weinberger, Judge of United States District Court, executed by Stanley S. Burrell of Hill, Morgan & Farrer re proposed findings.

38. Findings of Fact and Conclusion of Law dated April 15, 1949.

39. Judgment upon Distribution of Award provided for by Judgment and Decree in Condemnation.

40. Notice of Appeal filed April 28, 1949, by defendants Paul Gawzner and Irene Gawzner.

41. Supersedeas and Cost Bond filed on behalf of defendants and appellants Paul Gawzner and Irene Gawzner and Approval of Supersedeas and Cost Bond.

42. Notice of Appeal filed May 16, 1949, by defendant Leo Lebenbaum.

43. Cost Bond executed by Pacific Indemnity Company on behalf of defendant Leo Lebenbaum.

44. Stay Bond on Appeal filed by defendant Leo Lebenbaum.

45. Stipulation and Order for Extension of Time for Filing Records on Appeal and Docketing Appeals, filed June 7, 1949.

46. Stipulation and Order for Extension of Time for Filing Records on Appeal and Docketing Appeals, filed July 5, 1949.

47. Appellants Paul Gawzner and Irene Gawzner Concise Statement of the Points on which said appellants intend to Rely on Appeal.

48. Cross appellant Leo Lebenbaum Statement of Points on which said Cross Appellant intends to Rely on Appeal.

49. This Designation and Stipulation.

Dated: July 20, 1949.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL,

By /s/ STANLEY S. BURRILL,

Attorneys for defendants and
appellants Paul Gawzner
and Irene Gawzner.

PAUL R. COTE,

By /s/ PAUL R. COTE,

Attorneys for defendant
and cross appellant
Leo Lebenbaum. [287]

(Exhibit A to Joint Designation and Stipulation)
AGREED STATEMENT OF CERTAIN FACTS

It Is Stipulated and Agreed by and between defendants and appellants Paul Gawzner and Irene Gawzner and defendant and cross appellant Leo Lebenbaum through their respective counsel that the record discloses the following facts by documents which are not designated separately in the designation of the record and, for the purposes of abbreviation, only the pertinent facts are supplied:

1. On July 10, 1944, the United States of America instituted this action by filing a Complaint in

Condemnation substantially in the form of the Third Amended Complaint (set forth in the record in full and referred to as designation number 2), except that said original complaint sought to acquire the property involved for a term of years ending June 30, 1945, extendible for yearly periods thereafter during the then existing national emergency at the election of the United States of America, notice of such election to be filed in the within proceedings at least thirty days prior to the end of the term thereby taken or subsequent extensions thereof.

2. Possession of the premises involved was taken by the United States of America without court order pursuant to the provisions of the Second War Powers Act (Public Law 507—77th Congress) on July 10, 1944, at 1:00 o'clock P.M.

3. Answers were filed to the original complaint by defendants Paul Gawzner and Irene Gawzner and by defendant Leo Lebenbaum.

4. On April 10, 1945, pursuant to leave of Court, the United States of America filed an Amended Complaint in substantially the form of the original Complaint except that there was added thereto as Exhibit A a complete and detailed list and description of all personal property, the use of which was condemned and taken by the said United States of America; that said exhibit consisted of 130 pages of detailed listed articles constituting the furnishings and equipment of said hotel. [289]

5. By stipulation of the parties the respective

answers of said defendants to the original Complaint were deemed to be answers to the Amended Complaint.

6. On May 24, 1945, the United States of America filed in the within cause its election to renew for an additional period of one year its right to the exclusive use and possession of the property acquired in the above entitled proceedings, i.e., from July 10, 1945 to July 10, 1946.

7. On October 29, 1945, pursuant to leave of Court, the United States of America filed a Second Amended Complaint in substantially the form of the Amended Complaint except that the term for which the property involved was taken was made certain, to wit, for a term of years commencing July 10, 1944, and ending November 20, 1945.

8. Said defendants filed their respective answers to the Second Amended Complaint.

9. The defendants Paul Gawzner and Irene Gawzner opposed the motion of the defendant Leo Lebenbaum for an Order Excluding the Defendants Gawzner from Participation in Trial Proceedings. The Notice of said Motion is Designation number 10.

10. On October 23, 1946, pursuant to leave of Court, the United States of America filed a Third Amended Complaint in substantially the form of the Second Amended Complaint except that the term was made certain to cover the entire period that the property was actually in possession of

the United States of America, i.e., from July 10, 1944, to June 1, 1946. Said Third Amended Complaint is Designation number 2.

11. Prior to the Judgment and Decree in Condemnation entered November 26, 1946, the United States of America exercised its option pursuant to law requiring the defendants to join in their defense against the plaintiff so that all rental value and damages would be fixed as a unit regardless of the respective rights of the defendants in and to the award. The Court approved and authorized such procedure. [291]

12. During the trial of the distribution of the award between the defendants Paul Gawzner and Irene Gawzner and the defendant Leo Lebenbaum, it was stipulated by said parties that the answer of defendant Leo Lebenbaum to the Second Amended Complaint was deemed to be the Answer of said defendant to the Third Amended Complaint and so ordered by the Court. Said Answer is designation number 5.

13. Defendants Paul Gawzner and Irene Gawzner filed their Answer to the Third Amended Complaint and lodged their Cross Complaint. This Answer and the Cross Complaint are designation number 4. The Court permitted the filing of Paragraphs 1, 2, 3, 23, 24, 25, 26 and 27 of the Cross Complaint to be deemed a part of the Answer of said Defendants Paul Gawzner and Irene Gawzner. The Court did not permit the filing of Paragraphs 4, 5, 21 and 22 of the Cross Complaint.

The Court likewise refused permission to file Paragraphs 6 to 22, inclusive, of said Cross Complaint, but the defendants Paul Gawzner and Irene Gawzner do not now predicate error on such refusal.

14. On March 22, 1945, the United States of America petitioned the trial court for leave to deposit as estimated compensation the sum of \$52,693.55. On the same date the trial court ordered and allowed such deposit. Said order is set out in the record. (Designation number 6.) On March 23, 1945, said sum of \$52,693.55 was deposited in the registry of the court.

15. On April 18, 1945, pursuant to a stipulation of all parties and order of the trial court the sum of \$1,594.02 was paid to defendants Gawzner for taxes paid by them and as a credit upon any moneys to which they should be awarded herein by judgment.

16. On November 2, 1945, the United States of America petitioned the trial court for leave to deposit as estimated compensation the sum of \$13,500. Said petition was granted on November 19, 1945, and said sum of \$13,500 was deposited in the registry of the court on November 20, 1945.

17. On December 27, 1945, the United States of America petitioned the trial court for leave to deposit as estimated compensation the sum of \$7500. Said petition was granted on January 18, 1946, and said sum of \$7500 was deposited in the registry of the court on April 25, 1946. [293]

18. On January 3, 1947, the United States of America deposited the deficiency in the judgment dated November 26, 1946, in the sum of \$129,634.22 in the registry of the court.

19. On October 21, 1946, the Court denied the Petition for Withdrawal of Funds on Deposit (Designation number 20) without prejudice pursuant to consent of all appellants.

20. The United States of America offset the sum of \$1672.23 against an indebtedness due it from cross appellant Leo Lebenbaum in the Judgment of November 26, 1946 (Designation number 23) and said sum has been credited to him in the Judgment dated April 15, 1949 (Designation number 39).

21. Both appellants Gawzner and appellant Lebenbaum had other attorneys for whom their present attorneys were regularly substituted.

22. The moneys ordered distributed for restoration by the order dated June 6, 1947 (Designation number 25) were disbursed to and received by the respective parties in the amounts therein stated and their receipts and partial satisfactions have been filed. [294]

23. In addition to the moneys paid by the United States of America pursuant to the Judg-

ment dated November 26, 1946, it relinquished and left thereon improvements and equipment which it had erected and installed on the leased premises during its occupancy.

Dated: July 20, 1949.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL.
By /s/ STANLEY S. BURRILL.

Attorneys for defendants and
appellants Paul Gawzner
and Irene Gawzner.

PAUL R. COTE.
By /s/ PAUL R. COTE.

Attorney for defendant
and cross appellant
Leo Lebenbaum.

[Endorsed]: Filed July 20, 1949.

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

It Is Hereby Stipulated by and between defendants and appellants Paul Gawzner and Irene Gawzner and defendant and cross appellant Leo Lebenbaum through their respective counsel that the designation of the record as jointly prepared and filed

by appellants and cross appellants constitutes the complete record desired to be filed in the United States Court of Appeals for the Ninth Circuit; and

It Is Further Stipulated that the stipulating parties each have copies of the exhibits and of the Reporter's transcripts of the proceedings, which are described in said designation of the record and that the Clerk's copies of each thereof, or the originals of each thereof, which have heretofore been filed, may be transmitted to said Court of Appeals in conformity with Rule 75 (o) of the Rules of Civil Procedure for the United States District Courts as adopted by Rule 11 of the United States Court of Appeals for the Ninth Circuit.

Dated this 20th day of July, 1949.

HILL, MORGAN & FARRER

and STANLEY S. BURRILL,

By /s/ STANLEY S. BURRILL,

Attorneys for defendants and
appellants Paul Gawzner
and Irene Gawzner.

PAUL R. COTE,

By /s/ PAUL R. COTE,

Attorney for defendant
and cross appellant
Leo Lebenbaum.

[Endorsed]: Filed July 20, 1949. [297]

(e) The defendants and appellants Paul Gawzner and Irene Gawzner as owners of the property acquired by the plaintiff United States of America were not awarded the reasonable value of the use of said premises or the reasonable rental value thereof.

(f) The award to the defendant and cross appellant Leo Lebenbaum was for his loss of business and prospective profits.

(g) The award was divided between the defendants on some ratio based upon the reasonable rental or use value of the premises to the defendants and appellants Paul Gawzner and Irene Gawzner, as lessors, and the prospective profits of defendant and cross appellant Leo Lebenbaum, as lessee.

(h) There is no competent evidence to support such a division of said award.

5. The Court erred in holding in Finding number 17 that there was no evidence introduced as to whether or not a portion of the fund remaining for division, after the allocation of \$91,296 for restoration, was to include compensation for the time necessary for restoration in that all issues as to restoration were settled by stipulation of the parties.

6. The Court erred in holding in Finding number 18 that no evidence was introduced whereby the Court could make a finding as to excess wear and tear or excess costs of restoration in that all issues as to restoration were settled by the parties and the sum of \$91,296 was the agreed amount for restoration.

7. The Court erred in holding in Finding number 19 that no evidence was introduced as to the portion of the funds allocated to restoration which were properly chargeable to each defendant in that all divisions of the restoration fund were settled by stipulation of the parties.

8. The Court erred in holding in Finding number 19 that as to some items, restoration was made to an extent beyond that necessary to restore to the same condition as of the beginning of the lease and, therefore, not properly chargeable to restoration or damage caused by the plaintiff in that the parties agreed by stipulation that the sum of \$91,296 was the amount necessary for restoration. [302]

9. The Court erred in holding in Finding number 19 that there was no evidence from which the Court could make a finding as to what portion of the fund was used or should have been used to restore the premises not covered by the lease in that all divisions of the restoration fund were settled by stipulation of the parties.

10. The Court erred in holding in Finding number 22 that the sum of \$113,704 does not represent a sum which can be found to be the compensation for the use of said premises because the total judgment of \$205,000 had been depleted by an excess amount for restoration, in that such finding is contrary to the evidence and contrary to the stipulation of the parties.

11. The Court erred in considering in Finding number 27 the profits which the defendant and

cross appellant Leo Lebenbaum, as lessee, received or might receive from the operation of the hotel business and the ratio of those profits to rental for the premises.

12. The Court erred in making Finding number 28 in that the undisputed and uncontradicted testimony is contrary to such finding.

13. The Court erred in making Finding number 29 in that the undisputed and uncontradicted evidence is contrary to such finding.

14. The Court erred in admitting in evidence over the objections of the defendants and appellants Paul Gawzner and Irene Gawzner and in failing to strike from the evidence defendant and cross appellant Lebenbaum's Exhibits A and B.

15. The Court erred in admitting in evidence over the objection of the defendants and appellants Paul Gawzner and Irene Gawzner and in failing to strike from the evidence testimony as to profits of defendant and cross appellant Leo Lebenbaum both past and prospective profits of the operation of said hotel.

16. The Court erred in admitting in evidence over the objection of the defendants and appellants Paul Gawzner and Irene Gawzner and in failing to strike from the evidence the testimony of the witness Lloyd S. Pettegrew produced by defendant and cross appellant Leo Lebenbaum as to such past and prospective profits of the operation of said hotel.

17. The Court erred in refusing to the defend-

ants and appellants Paul Gawzner and Irene Gawzner permission to file Paragraphs IV, V, XX and XXI of their Cross Complaint and Exhibit B attached thereto.

18. The Court erred in not signing the Findings of Fact submitted by the defendants and appellants Paul Gawzner and Irene Gawzner.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL,
By /s/ STANLEY S. BURRILL,

Attorneys for defendants and
appellants Paul Gawzner
and Irene Gawzner.

[Endorsed]: Filed July 20, 1949. [305]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Appellant, Leo Lebenbaum, submits the following statement of points which he will rely upon in his appeal:

1. The Court erred in failing to award to appellant, Leo Lebenbaum, the entire balance of the funds in the registry, after deducting and ordering paid to appellants Gawzner the sum due to them for the Government's use and occupancy of the area not leased to Lebenbaum.

2. The Court erred in not separately finding the sum due appellants Gawzner for the Government's

use and occupancy of the [306] area not leased to Lebenbaum.

3. The Court erred in failing to find and decree that appellants, by contracts, stipulations, judgments and orders had completely abandoned the measure of market value and just compensation and had permanently fixed the sum of \$113,704.00, together with the value of the improvements left by the Government and relinquished to the appellants, as the compensation, other than restoration damage, to be paid for rental.

4. The Court erred in denying Lebenbaum's motion to exclude appellants Gawzner from participation in the trial proceedings, except as to the value of the use and occupancy of the area not leased to Lebenbaum.

5. The Court erred in refusing to find and decree that its jurisdiction was limited to determining—

- a) what interests the plaintiff had taken;
- b) from whom they were taken;
- c) what the appellants had fixed and agreed to be the compensation for such taking, after they had deducted and received their fixed and agreed compensation for restoration;
- d) who was entitled to such compensation.

6. The Court erred in refusing to find and decree that it was without jurisdiction to try and determine the contract rights of appellants Gawzner, against appellants Lebenbaum, to collect rents under the lease during the plaintiff's occupancy of the leased premises, or to enforce payment thereof.

7. If the Court had jurisdiction to determine and enforce payment of the rental due from Lebenbaum to Gawzners under the lease, during the period of plaintiff's occupancy of the leased premises, it should have found and decreed that such rental was the minimum guarantee of \$1500 per month as provided in paragraph three of the lease.

8. The Court erred in overruling Lebenbaum's objection to and in refusing to strike the answer of the witness Edw. H. Allen, to the question seeking his opinion as to the market or bonus value of the lessee's interest in the lease from the Gawzners to Lebenbaum.

9. The Court erred in overruling Lebenbaum's objection to and in refusing to strike the answer of the witness, Charles G. Frisbie, to the question seeking his opinion as to the market or bonus value of the lessee's interest in the lease from Gawzners to Lebenbaum.

PAUL COTE.

By /s/ PAUL R. COTE,

Attorney for Defendant and
Appellant Leo Lebenbaum.

[Endorsed]: Filed July 20, 1949. [308]

DEFENDANTS' EXHIBIT NO. 1

Lease

This Lease, made and entered into this 15th day of December, 1943, by and between Paul Gawzner

and Irene Gawzner, husband and wife, of the County of Santa Barbara, State of California, hereinafter called the Lessors, and Leo Lebenbaum, of Eureka, California, hereinafter called the Lessee.

Witnesseth:

That the Lessors, for and in consideration of the rents herein agreed to be paid by the Lessee, and all the other covenants, conditions and agreements herein agreed to be performed by said Lessee, do by these presents lease, let and demise unto the Lessee, and the Lessee does hereby lease, hire and take of and from said Lessors, for the term hereinafter specified, that furnished hotel known as Miramar Hotel and Bungalows, situated upon that certain real property in El Montecito, County of Santa Barbara, State of California, and particularly described as follows, to-wit:

Parcel A: Beginning at the southeast corner of Jacob Oleson's land surveyed March 29, 1876; thence 1st north 1606 feet to the northeast corner of aforementioned tract; 2nd, east 176.39 feet to the northwest corner of Dayton's land; 3rd, south 495 feet; thence 4th, east 293.81 feet; thence 5th, south 478.37 feet more or less to a point in the center line of the Coast Highway at the northwesterly corner of Parcel Two as described in deed to Paul Gawzner recorded in Book 484 of Official Records of said County at page 4; thence 6th, north $70^{\circ}16'$ west along the center line of said Coast Highway 23.70

Defendants' Exhibit No. 1—(Continued)
feet; thence south $0^{\circ}27'$ west 327.38 feet to the beginning of a curve to the right having a central angle of $83^{\circ}01'$ and a radius of 40 feet; thence along said curve a distance of 57.96 feet to the beginning of a tangent to said curve; thence along said tangent south $83^{\circ}28'$ west 202.70 feet; thence south $4^{\circ}03'$ east to a point in the southerly line of Parcel Four of the above mentioned Gawzner deed; thence westerly along said southerly line of Parcel Four to the point of beginning.

Excepting, however, all that portion thereof lying north of the center line of the Coast Highway as now located.

Also Excepting that portion thereof lying within the lines of the strip of land known as the Southern Pacific right of way.

Also Excepting that portion thereof, if any, included within the lines of the tract of land quitclaimed to David S. Cook, Sr., by Emmeline Doulton, by deed dated December 19, 1903 and recorded in Book 98, at page 86 of Deeds, records of said County.

Also Excepting therefrom that portion thereof covered by that certain deed from Paul Gawzner, et ux, to the State of California, recorded in Book 552, at Page 275, Official Records of Santa Barbara County, California.

Parcel B: Lots 8, 9, 12, 19, 20, 21, 22, 23 and

Defendants' Exhibit No. 1—(Continued)
24 of Ocean Side subdivision, in said County of Santa Barbara, State of California, according to the map thereof recorded in Book 1, at page 29 of Maps and Surveys in the office of the County Recorder of said County and the following described portion of Lot 13 of said subdivision:

Beginning at the southeasterly corner of said Lot 13 in the center of Ocean Avenue; thence west along the south line of said Lot 13, 240.24 feet more or less to the southwestly corner thereof; thence north along the west line of said lot 6.42 feet; thence east 138.54 feet; thence south $77^{\circ}39'$ east 14.02 feet; thence east 88.0 feet to a point in the easterly line of said lot in the center of Ocean Avenue; thence south along said east line 3.42 feet to the point of beginning.

Excepting from said Lots 21, 22 and 23, the westerly twenty feet thereof, as reserved "for road purposes" in the deed from Elizabeth A. Humphry, et al, to Harriet Dorr Doulton, dated March 27, 1899 and recorded in Book 66, at page 427 of Deeds, records of said County.

Also Excepting from said Lot 24, the southerly and westerly twenty feet thereof, as reserved "for road purposes" in the deed from Elizabeth A. Humphry, et al, to Mrs. H. M. A. Postley, dated January 31, 1899 and recorded in

Defendants' Exhibit No. 1—(Continued)
Book 66, at page 73 of Deeds, records of said County.

Also Excepting from said Lots 19 and 20 the portions thereof covered by that certain deed from Paul Gawzner, et ux, to the State of California, recorded in Book 552, at page 275, Official Records of Santa Barbara County, California.

Parcel C: Beginning at a point on the easterly line of Parcel Two as described in deed to Paul Gawzner recorded in Book 484 of Official Records of said County at page 4 said point being distant thereon south $0^{\circ}32'30''$ west 232.10 feet from the northeasterly corner thereof; thence along said easterly line of Parcel Two south $0^{\circ}32'30''$ west 96.12 feet to the southeasterly corner thereof; thence along the southerly line of said Parcel Two north $88^{\circ}55'$ west 80.03 feet to the beginning of a curve to the right having a central angle of $89^{\circ}22'$ and a radius of 25 feet; thence along said curve 38.99 feet to the beginning of a tangent to said curve; thence along said tangent north $0^{\circ}27'$ east 51.10 feet; thence south $89^{\circ}33'$ east 88.0 feet; thence north $0^{\circ}27'$ east 19.0 feet; thence south $89^{\circ}33'$ east 16.91 feet to the point of beginning.

Parcel D: A right of way for road purposes for the benefit of the lands described in Parcels A, B and C above, over the following land:

Beginning at the northwesterly corner of

Defendants' Exhibit No. 1—(Continued)

Parcel Two as described in the above mentioned Gawzner deed said corner being on the center line of the Coast Highway; thence along said center line north $70^{\circ}16'$ west 23.70 feet; thence south $0^{\circ}27'$ west 327.38 feet; thence south $89^{\circ}33'$ east 30.0 feet; thence north $0^{\circ}27'$ east 316.88 feet to a point in the center line of the Coast Highway; thence along said center line north $70^{\circ}16'$ west 8.08 feet to the point of beginning; including all of the improvements situated upon said property and all of the furniture, furnishings, tools, implements and other personal property used in the operation of said hotel, including, but without limiting the generality of the foregoing, all of the personal property included in that certain inventory and appraisal made by Fidelity Appraisal Company (West) currently herewith, copies of which are in the possession of the respective parties hereto and identified by their signatures, and which inventory by such reference is made a part hereof as though annexed hereto, and herein said parties do mutually agree as follows:

One: Term. That the term of this lease shall be five (5) years and fifteen (15) days and shall commence on the 15th day of December, 1943, and end on the 31st day of December, 1948; provided, however, that Lessee shall have, and he is hereby given, the option of renewing the lease upon the same terms as are herein set forth for an additional term of five (5) years, such option to be exercised

Defendants' Exhibit No. 1—(Continued)

on or before June 30, 1948, by notice in writing to said Lessors, and failure to give such written notice within such time shall constitute a waiver of such option of renewal.

Two: Use Of Premises. Said premises are hereby let and they shall be used by Lessee only for the purpose of carrying on the business of operating a hotel, with a cafe, bar and restaurant, and all of the other usual activities of hotels or resorts generally, including the operation of beach facilities, and the same shall be continuously operated as such under the name of "Miramar Hotel and Bungalows" or some other name featuring the word "Miramar."

Three: Rent. Said Lessee shall pay no rent for the balance of the month of December, 1943, but commencing with January 1, 1944, said Lessee shall pay to said Lessors as rent for said premises the following percentages of the gross business done on said leased premises as follows:

(a) Thirty-five (35) per cent of the gross business from the rental of cottages, rooms, cabanas, lockers and beach privileges.

(b) Fifteen (15) per cent of the gross business from the sale of beer, wine and liquor, including soft drinks.

(c) Five (5) per cent of the gross business from the sale of all food.

Provided, however, that Lessee shall guarantee to said Lessors a minimum rental of One Thousand

Defendants' Exhibit No. 1—(Continued)

Five Hundred Dollars (\$1500.00) per month. Said rentals shall be payable as follows: The minimum guaranteed rental of One Thousand Five Hundred Dollars (\$1500.00) shall be paid monthly in advance on the first day of each and every month of said term, commencing February 1, 1944, (receipt being hereby acknowledged of the sum of \$1500.00 covering the guaranteed rental for the month of January, 1944), subject to the averaging of the percentage rentals above provided for as follows: on or before the 10th day of each month, commencing with the 10th day of February, 1944, the percentages of the gross business above provided for the preceding month shall be computed and if such percentage rental shall be in excess of the One Thousand Five Hundred Dollars (\$1500.00) guaranteed rental paid for the preceding month, said excess shall be paid to said Lessors forthwith. If, however, the amount paid by Lessee to Lessors as rental for any month, including both the guaranteed rental and the percentage rental, shall exceed One Thousand Five Hundred Dollars (\$1500.00), the excess over said guaranteed rental may be applied by Lessee as a credit on the minimum guaranteed rental for any subsequent month or months in the same calendar year in which the percentage rental for that month or months is less than One Thousand Five Hundred Dollars (\$1500.00) and if in any month the guaranteed rental shall exceed the amount of percentage rental, then the amount of such excess may be de-

Defendants' Exhibit No. 1—(Continued)

ducted and retained by Lessee from the amount of percentage rental payable to Lessors in any subsequent month or months in the same calendar year in which and to the extent the amount of percentage rental exceeds One Thousand Five Hundred Dollars (\$1500.00), to the end that said Lessee shall not pay more rental for any year of the term of said lease, nor shall said Lessors receive less for any such year, than Eighteen Thousand Dollars (\$18,000.00) or the percentages of gross business done during the year, as above provided, whichever is greater. If during any calendar year the percentage rental payable hereunder shall reach the sum of Forty-Five Thousand Dollars (\$45,000.00), the percentages of gross business thereafter payable as rent for the balance of said calendar year shall be reduced to the following:

(a) Thirty (30) per cent of the gross business from the rental of cottages, rooms, cabanas, lockers and beach privileges.

(b) Ten (10) per cent of the gross business from the sale of beer, wine and liquor, including soft drinks.

(c) Five (5) per cent of the gross business from the sale of food.

In computing the percentages of gross business as above provided, any and all sales or direct taxes now imposed by the State or Federal Government on commodities or services sold or furnished by Lessee in the operation of said hotel, as well as any

Defendants' Exhibit No. 1—(Continued)

additional or other sales or similar taxes that may be hereinafter imposed by the State, Federal or any municipal government, and which are charged directly to the patron or customer and not absorbed by the Lessee, shall be deducted from gross business before the making of such computation.

In connection with the percentage rentals, it is agreed that if Lessee shall lease any rooms in said hotel on the so-called "American Plan" or with meals included in the quoted rate, no more than Three Dollars (\$3.00) per person per day shall, as between the Lessors and Lessee hereunder, be allocated for food; provided, however, that either Lessors or Lessee may request a revision in said allocation by notice to the auditor hereinafter specified, whose decision shall be final and binding. Further, all credit losses shall be borne by Lessee and shall not reduce the percentage rental above provided. Further in this connection, complimentary accommodations furnished by Lessee to the trade shall not be considered in computing such percentage rentals.

Said Lessee shall keep his hotel accounting in accordance with the hotel accounting system of Messrs. Horworth & Horworth, auditors, or such other system as may be approved by the parties hereto, and shall keep and maintain adequate books of account showing the totals of all gross business done on said premises and shall, on or before the 10th day of each and every month, furnish to said

Defendants' Exhibit No. 1—(Continued)

Lessors adequate statements showing said gross business, divided in accordance with the schedule of rental above specified. Likewise, a complete audit shall be had of the books of account of said Lessee, on a quarterly basis, commencing March 31, 1944, made by said Horworth & Horworth, or other independent auditors satisfactory to the parties hereto, the expense of which audits shall be borne by Lessee. Further in this connection, Lessee shall furnish Lessors with a daily report of business done by him in said hotel.

Four: Possession. Possession of said premises shall be delivered to said Lessee on midnight of December 15, 1943.

Five: Repairs. Lessors covenant and agree to keep the roof, foundations, structural supports and outer walls of all buildings on said leased premises, exclusive of plate glass or other windows, in good order and repair and properly painted, and all other costs, charges and expenses of upkeep, repair and replacement of said leased property, including the care of lawns, flowers, shrubbery and trees, shall be at the sole cost, charge and expense of Lessee. Lessors' obligation so to keep in repair the roof and outer walls shall only come into being upon receiving written notification from Lessee that such repairs are needed, and Lessors shall have a reasonable time thereafter in which to make such repairs.

Six: Improvement Fund. That as a further consideration for this lease, Lessee shall forthwith and

Defendants' Exhibit No. 1—(Continued)

contemporaneously with the execution hereof deposit the sum of Twenty Thousand Dollars (\$20,000.00) with County National Bank and Trust Company of Santa Barbara to be drawn upon jointly by the parties hereto for the making of permanent improvements upon said leased premises as agreed upon by said parties. In this connection, it is the intention of said parties that all of said fund shall be used and invested in said leased premises as soon after the commencement of the term hereof as possible, to the end that such improvements shall increase the income producing possibilities of said leased premises, but any delay in the making of such improvements and investments of said fund shall not free said fund from the primary purpose contemplated by this paragraph. Further in this connection, the parties now contemplate the moving of certain cottages from one location to another on said leased premises and the making of various improvements to the beach forming a part of said leased premises, including the building of cabanas, and the making of other income producing improvements and additions, but realize that certain of said improvements may not now be made because of the rules and regulations of the Office of Price Administration, the War Labor Board and other Federal agencies. However, at such time or times as, and as soon as, the improvements contemplated and proposed from time to time by Lessors, and approved by Lessee, can be made, the same shall be

Defendants' Exhibit No. 1—(Continued)

made from said fund so above created in the name of said Lessee but under the supervision of said Lessors. Any and all improvements placed upon said leased premises pursuant to this paragraph shall become the property of said Lessors as though existing and in being on said leased premises at the commencement of the term hereof. Any balance in said account from time to time not theretofore expended for improvements upon said leased premises shall be maintained in said account as security to said Lessors for the performance of the terms of this lease by Lessee; but should said Lessors sell said leased premises prior to the date that the whole of said fund has been invested in said premises, any part remaining unspent at the time of such sale shall revert to Lessee free of any obligation hereunder. Any part of said fund not used for improvements upon said premises during the term of this lease, provided said premises have not been sold by said Lessors, shall revert to and become the property of Lessors, to all intents and purposes as though the same had been paid as an additional rental for the execution of this lease.

Seven: Furnishings Replacement Fund. That as a further consideration for said lease, said Lessee shall monthly, commencing with February, 1944, covering the business done in the month of January, 1944, and monthly thereafter during each and every month of said term, deposit into a special account

Defendants' Exhibit No. 1—(Continued)
with County National Bank and Trust Company of Santa Barbara in the names of himself and Lessors three (3) per cent of the gross business from the rental of cottages, rooms, cabanas, lockers and beach privileges and from the sale of beer, wine and liquor, including soft drinks, but less sales tax as provided in Paragraph Three hereof, done by him the preceding month, as a fund for the replacement of furnishings, furniture, carpets, heaters and/or all other personal property covered by this lease; provided, however, that not more than Three Thousand Dollars (\$3000.00) per calendar year shall be required to be placed in said fund. In this connection, in addition to the obligation to maintain and repair imposed on Lessee in Paragraph Five hereof, it is the intention of the parties that said Lessee shall maintain all of the furniture, furnishings and personal property leased hereby in the same condition as the same were in at the commencement of the term, and, to that end, as any of said personal property shall, by use or otherwise, be rendered unrepairable, the same shall be replaced from said fund so created, to the end that, upon the termination of this lease, said Lessors shall receive back furniture, furnishings and other personal property of as good character and value as the same is in at the commencement of this lease. Any and all withdrawals upon such fund shall be made by all the parties hereto but said Lessee shall not unreasonably withhold his consent to the replace-

Defendants' Exhibit No. 1—(Continued)

ment and renewal of any articles of personal property suggested for renewal by said Lessors. Any and all personal property purchased pursuant to the terms of this paragraph shall be and remain the property of said Lessors, to all intents and purposes as though in existence at the time of the execution of this lease, and any such renewals or replacements shall be subject to the obligation of said Lessee to maintain and repair, or further replace, pursuant to this paragraph. Upon the termination of this lease, any and all of said fund so remaining that shall not have theretofore been used for the repair and replacement of personal property covered by this lease shall be used to properly repair and restore said personal property to the state it was in at the commencement of the term hereunder, and any balance then remaining shall revert to and become the property of Lessee, subject to the adjustment of any indebtedness from said Lessee to said Lessors.

In connection with the expenditures of the fund provided for in Paragraph Six, it is contemplated that, as various improvements are made, Lessee will be required to provide furniture and furnishings for use therein. Such furniture and furnishings shall be provided by Lessee from his own funds, separate from either the fund provided for in Paragraph Six or the fund provided for in this Paragraph Seven, but shall remain on and become

Defendants' Exhibit No. 1—(Continued)

the property of Lessors on the termination of this lease. Further in this connection, it is the intention of the parties that additions of furniture or furnishings to the hotel facilities now available, but not those subsequently erected, shall be made from the fund provided for in this Paragraph Seven.

Eight: Garage. It is understood that Lessors own a garage building adjoining on the south and east the property covered by this lease. While said lease does not cover said garage, said Lessors anticipate that, until they shall elect to improve or otherwise use said garage building, the same may be used by Lessee rent free for the use of guests of said hotel. In the event said Lessors shall elect to improve and alter said garage building, so that the same may be used as a motion picture theatre, bowling alley, billiard hall, pool room, card room or any other type of amusement center, then they shall, as part of such improvement, so alter the basement of said garage building that the same may be used as a garage, and said basement shall, from that time on, be available to said Lessee rent free for the storage of cars of his guests in said hotel, and, at the request of Lessee, will at that time, by proper instrument in writing, be made a part of the premises covered by this lease. Said Lessors shall be free to operate, lease or contract for the use of the main floor of said garage building after such improvement, provided, however, that any business conducted therein shall not, either directly or in-

Defendants' Exhibit No. 1—(Continued)

directly, compete with the business operated by Lessee pursuant to this lease and shall be operated in such a manner as not to be detrimental to the general neighborhood or to the business conducted by Lessee pursuant to this lease.

Nine: Public Utility Charges And Other Bills. Said Lessee covenants, promises and agrees to pay all charges or rates for water, gas, power, electricity or other public utilities used or consumed in or about said premises; and also agrees to pay promptly all accounts incurred by him in the operation of said leased premises.

Ten: Condemnation. The Lessee has heretofore been informed and knows that the State of California has heretofore acquired from Lessors, by deed recorded in Book 552, Page 275, Official Records of Santa Barbara, County, California, and is the owner of, a strip of land adjoining U. S. Highway 101 which is presently being used by Lessors for hotel purposes but which may ultimately be put to highway uses by the State of California. In the event the State of California or the County of Santa Barbara or any other public body shall be condemnation acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the Lessors, but Lessors shall pay any and all assessments levied in any such condemnation proceeding. In the event any such condemnation suit shall include any buildings

Defendants' Exhibit No. 1—(Continued)

upon said leased premises, said Lessors, at their sole cost and expense, shall relocate the same upon said leased premises in some place mutually agreeable. Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other.

Eleven: Destruction Of Premises. If fire, earthquake or other casualty shall destroy or damage the improvements on said leased premises, the parties agree:

(a) That if such destruction or damage shall be minor in nature, Lessors shall, as soon as the insurance money is available, promptly repair the same and Lessee shall be entitled to no rebate of rent during such repair period.

(b) That if such destruction or damage shall destroy, damage or render unfit for occupancy less than fifty (50) per cent of the rentable rooms in said hotel, then Lessors shall, as promptly as possible after payment of the insurance money on such loss, repair and rebuild the same and replace any personal property destroyed, and during the repair period Lessee shall be entitled to a reduction in the minimum guaranteed rental in the ratio that the number of rentable rooms so destroyed, damaged or

Defendants' Exhibit No. 1—(Continued)
rendered unfit for occupancy bears to the total number of rentable rooms.

(c) That if such destruction or damage shall destroy, damage or render unfit for occupancy fifty (50) per cent or more of the rentable rooms of said hotel, then Lessors may either (1) repair and rebuild the same and replace any personal property destroyed as promptly as possible after the payment of the insurance money on such loss or (2) terminate and cancel this lease. If Lessors shall elect to so repair and rebuild, then during the period of reconstruction the minimum guaranteed rental shall be entirely waived by Lessors.

(d) That if such destruction shall be complete and total and shall cover all of the improvements on said leased premises, then this lease shall ipso facto cease and terminate with destruction.

(e) That said Lessee shall not, other than the waivers and rebates hereinabove provided for, be entitled to any compensation or damage on account of any inconvenience in making any of said repairs or replacements.

Twelve: Assignments. Said Lessee further covenants and agrees not to assign this lease or sub-let the whole or any portion of the demised premises, except in the ordinary course of his business of conducting a hotel, without the written consent of said

Defendants' Exhibit No. 1—(Continued)

Lessors first had and obtained provided, however, that said Lessee may assign said lease to either a corporation in which he or his wife holds the majority stock or a limited partnership in which he is the general partner, or a general partnership in which both he and his wife are the general partners. Any assignment made hereunder shall be in writing and the assignee shall, by provision in said assignment, assume all obligations of this lease, a copy of which assignment, as executed, must be delivered to Lessors before it is effective; and when these conditions have been complied with, the assignment shall become effective, provided, however, that such assignment by Lessee shall not in any way relieve or release him from liability hereunder.

Thirteen: Waste. Said Lessee further covenants and agrees that he will not commit or suffer any damage or waste upon said premises, and that at the end of said term, or any renewal thereof, or any sooner termination of this lease, he will quit and surrender up peaceable possession of said premises to said Lessors in as good order and condition as the same were in at the commencement of said term, reasonable use and wear thereof and damage by the elements excepted.

Fourteen: Compliance with Ordinances. That said Lessee will not use, or suffer or permit any person to use, in any manner whatsoever, the said premises nor the buildings or improvements thereon or any portion thereof for any purpose tending to

Defendants' Exhibit No. 1—(Continued)

injure the reputation of the premises or of the neighborhood property or to constitute a nuisance, or for any purpose or use in violation of the laws of the United States or of the State of California or of the Ordinances and Regulations of the County of Santa Barbara; and that he will obtain all permits or licenses required by such laws, and pay all fees and expenses incurred therefor; and that all sidewalks, spaces and excavations either under the sidewalks or adjacent to said building shall be kept in good, safe and secure condition, and all alleys, passageways on or adjoining said premises shall be kept in a clean and safe condition, and that all cost and expense therefor shall be paid and discharged by the said Lessee; and that the said Lessee shall hold the Lessors and said property free and harmless from any cost, loss, damages, attorneys' fees, expense or other liability for any claims or demands arising out of the use of said premises or the violation of any law in connection therewith, or for any injury to any person arising out of the use and occupation of said premises, or any other claim or demand whatsoever in connection therewith.

Fifteen: Improvement by Lessee. Said Lessee shall not make any structural or other alterations upon said leased premises without the written consent of said Lessors first had and obtained. Any and all such alterations so proposed to be made by Lessee shall be approved in writing by Lessors, but shall be paid for by Lessee, unless the parties other-

Defendants' Exhibit No. 1—(Continued)

wise agree, and shall remain on the premises for the benefit of said Lessors upon the termination of this lease. In this connection, should said Lessee make any such alterations, with the consent of the Lessors, he agrees to hold said Lessors harmless from the claims of any laborers or materialmen in connection therewith and said Lessors are given full permission to post notice of non-responsibility upon said property as provided in the Mechanic's Lien Law of the State of California.

Sixteen: Public Liability. Said Lessee further covenants and agrees that he will protect and fully indemnify and save harmless said Lessors from and against any and all damage, loss, costs, charges and demands whatsoever, which said Lessors may sustain or incur or be subjected to, that may be directly or indirectly caused by or due to or grow out of the occupation of said leased premises by said Lessee. In this connection, said Lessee shall carry public liability insurance, with a reliable company, in limits of not less than One Hundred Thousand Dollars (\$100,000.00) for injuries to one person and Three Hundred Thousand Dollars (\$300,000.00) for injuries to more than one person, which policy by its terms shall be made for the protection of the Lessors as well as the Lessee and shall cover all public liability risk upon said leased premises.

Seventeen: Insurance, Taxes and Assessments. Said Lessors shall at all times keep the improvements on said leased premises properly insured

Defendants' Exhibit No. 1—(Continued)

against fire loss with such companies as they may elect in an amount or not less than One Hundred Thousand Dollars (\$100,000.00) and the personal property in an amount not less than Sixty Thousand Dollars (\$60,000.00), and shall also pay before delinquent, all taxes and assessments that may be levied upon said leased premises. In the event said Lessors shall default in the maintenance of such insurance or in the payment of taxes and assessments, Lessee may, at his option, pay the same, and deduct the amounts paid from future rentals due said Lessors.

Eighteen: Lessors' Inspection. It is understood and agreed that said Lessors reserve the right to enter into and upon said leased premises, either personally or by their agents or attorneys, for the purpose of making repairs, alterations or improvements upon the leased premises, without, however, hereby enlarging the obligation to repair hereinabove set forth, or for the purpose of inspecting the premises hereby leased. In this connection, it is understood and agreed that said Lessors may, at any time, during business hours, inspect the books of account of said Lessee, as well as all cash registers and other records showing the gross sales or gross business done on said leased premises, and said Lessee shall retain all cash register tapes and cards until inspection by Lessors, but not exceeding three (3) years.

Nineteen: Competing Business. It is understood that the leased premises are a portion of larger

Defendants' Exhibit No. 1—(Continued)

holdings of said Lessors and that said Lessors contemplating the sale or leasing of the property adjoining said leased premises. In this connection, said Lessors covenant and agree for themselves, their heirs, executors, administrators, tenants, grantees and assigns that, during the term of this lease, or any renewal thereof, no competing business shall be maintained upon said adjoining premises owned by said Lessors and further agree that if they shall lease or sell any of said adjoining property, they will, either in the instrument of lease or transfer, or by separate instrument, obtain from such Lessee or Vendee a contract running with the land that such Lessee or Vendee, and his successors, will not conduct a competing business on the adjoining premises during the term of this lease or any renewal thereof.

Said Lessors further covenant and agree that they will not, during the term of said lease, or any renewal thereof, engage in the hotel business in the County of Santa Barbara.

Twenty: Assumption of Contracts. Said Lessee agrees to assume the obligation imposed on said Lessors in the following contracts incurred by them in connection with the operation by them of the hotel on said leased premises, to-wit:

(a) Agreement dated January 25, 1943, with Electrical Products Company;

(b) Agreement dated April 5, 1943, with Cooks Co., Inc.;

Defendants' Exhibit No. 1—(Continued)

(c) Agreement dated July 10, 1943, with The Diamond Match Company;

(d) Agreement dated June 24, 1943, with Lion Match Company, Inc.;

and agree to hold said Lessors harmless from the same on and after December 15, 1943.

Twenty-one: Bankruptcy. It is further understood and agreed that if said Lessee shall be adjudicated as bankrupt or shall make any assignment for the benefit of creditors, or shall take any other steps toward a liquidation in insolvency or should his business be attached and the same not released from attachment within five (5) days, or should any sale or attempted sale of the leasehold interest hereby created be attempted to be made under or by virtue of any execution or other judicial process, said Lessors shall have the right to immediately terminate this lease and no person shall have the right to use, possess or occupy said premises by virtue of any such adjudication, insolvency, assignment or sale.

Twenty-two: Default. It is understood and agreed that if Lessee shall be in default in the payment of rent for a period of ten (10) days or shall make default in any of the other terms and covenants hereof and shall fail to remedy such default within ten (10) days after receiving written notice from Lessors specifying such default, said Lessors may, at their option: (1) re-enter the said premises, either with or without process of law, and re-

Defendants' Exhibit No. 1—(Continued)

possess themselves of the same, either personally or by receiver, and re-let the same or any part thereof at such rental and upon such terms and conditions as they may deem proper, and apply the proceeds thereof, less the expenses, including the usual agents' commissions so incurred, upon the amount due from said Lessee hereunder, and said Lessee shall be liable for any deficiency, and such taking of possession of said premises and such reletting shall not operate as a termination of this lease unless said Lessors so elect, such election to be evidenced by written notice to said Lessee; (2) declare the term of this lease ended, in which event said Lessee shall peaceably and quietly surrender and deliver up possession of said leased property to Lessors; or (3) pursue any other remedy or remedies afforded them at law or in equity.

Twenty-three: Waiver. It is further understood and agreed that any waiver, express or implied, by said Lessors, of any breach by the Lessee of any covenant of this lease shall not be, nor be construed to be, a waiver of any subsequent breach of a like or other covenant of this lease. In the event either party hereto shall file an action against the other for the enforcement or construction of any term of said lease, the losing party shall pay all reasonable attorneys' fees expended or liability incurred by the other party in such action, and such attorneys' fees may be taxed as costs.

In the event the Lessors shall, without fault on

Defendants' Exhibit No. 1—(Continued)

their part, be made party to any litigation concerning this lease, brought against said Lessee, then said Lessee shall pay all costs and attorneys' fees incurred by said Lessors in the defense of any such litigation.

Twenty-four: Notices. All notices to be given by said Lessors to said Lessee may be given by sending the same by registered mail, postage prepaid, addressed to said Lessee at Miramar Hotel, Santa Barbara, California.

All notices to be given by Lessee to Lessors may be given by sending the same by registered mail, postage prepaid, addressed to the Lessors in care of County National Bank and Trust Company, 1000 State Street, Santa Barbara, California.

The Lessors and the Lessee may change the places of giving notice above specified by written notice of any change of address so desired.

Twenty-five: Protection of Title. The said Lessee agrees to protect said premises from the acquisition by the public of any easement or right of way over the same by user and, in the event any portion of said premises is used as or converted into a passageway or entrance, then said Lessee agrees, at such periods of time as may be sufficient under the laws of the State of California to prevent the acquisition of any rights in the public, to erect such obstructions therein for such time as the law may require, and, in the event the said Lessee does not so protect the said property by periodically

Defendants' Exhibit No. 1—(Continued)

erecting such obstructions, gates or other evidences of private ownership, the said Lessors are hereby given the right to enter upon said premises and to so place such obstructions, gates or other evidences of private ownership, provided, however, that any such gates shall not be maintained longer than twenty-four (24) hours at any one time and at intervals not more frequent than once each year.

Twenty-six: Liquor Licenses. As part of the consideration of said Lessee entering into this lease, said Lessors are contemporaneously herewith transferring to said Lessee, so that he may engage in the sale of beer, wine and spirits on said premises, their liquor licenses issued by the State of California. It is understood and agreed that said licenses shall not be sold, assigned, transferred or encumbered by said Lessee and that, upon the expiration of this lease, or any renewal thereof, or upon the termination thereof, said Lessee shall re-assign and transfer back said licenses to said Lessors, the parties hereby understanding that said licenses are part and parcel of the hotel now and hereafter to be operated upon said premises. Said Lessee shall pay all license fees and other charges in connection with said liquor licenses during the term of this lease, or any renewal thereof. In this connection, said Lessee shall be under no liability to Lessors if said licenses or any of them shall be cancelled by the State of California without fault or guilt on the part of said Lessee.

Defendants' Exhibit No. 1—(Continued)

Twenty-seven: First Refusal of Purchase. Said Lessee shall have, and he is hereby given, the first refusal of purchasing said premises from said Lessors, as follows: In the event said Lessors shall contemplate selling said leased premises, or any part thereof, and should receive a bona fide offer for the purchase thereof, the terms of said offer shall be communicated in writing to said Lessee, who shall have ten (10) days thereafter in which to enter into an agreement with said Lessors for the purchase of said premises at the price and upon the terms contained in the communication to him, failing in which, said Lessors may then sell in accordance with the offer theretofore received by them and communicated to said Lessee; but such sale shall be made subject to this lease. In this connection, it is understood and agreed that the first refusal given by this paragraph shall not apply as against any subsequent transferee thereof, in the event said Lessee has failed to exercise the option herein granted at the time of sale by Lessors.

Twenty-eight: Warranties. The said Lessee states that he has made an independent investigation of said leased premises and of the business now being conducted thereon, and is entering into this lease solely as a result of his own investigation of the whole transaction and not as a result of any warranties, representations or inducements made by said Lessors, other than in this agreement con-

Defendants' Exhibit No. 1—(Continued)
tained or in any other agreements in writing made concurrently herewith.

Twenty-nine: Construction. It is understood and agreed that this lease shall not constitute, nor be construed to constitute, any partnership as between the Lessors and the Lessee but is intended solely as a lease in which rental is partly measured by the gross business of the Lessee.

Thirty: Recordation. It is understood that this lease shall not be recorded in toto but, in lieu thereof, there shall be recorded in the Office of the County Recorder of the County of Santa Barbara, California, a memorandum of the lease setting forth the fact of the making thereof. Upon the expiration of the term hereof, or any renewal, or upon the termination of this lease in any of the manners provided herein, Lessee will, with his wife, execute and deliver to Lessors a proper instrument clearing the record title of his interest as Lessee pursuant to said recorded memorandum.

Thirty-one: Peaceable Possession. It is understood and agreed that the Lessee, so long as he shall pay his rent and keep and perform the covenants and agreements herein contained on his part to be kept and performed, shall and may peaceably and quietly hold and enjoy the said leased premises for the term aforesaid, without let or hindrance on the part of the Lessors, or any one claiming by or through Lessors.

This lease, executed in duplicate, shall inure to

Defendants' Exhibit No. 1—(Continued)

the benefit of and bind the parties, their respective heirs, executors, administrators and assigns.

In Witness Whereof, said parties have hereunto set their hands the day and year first above written.

/s/ PAUL GAWZNER,

/s/ IRENE GAWZNER,

Lessors.

/s/ LEO LEBENBAUM,

Lessee.

DEFENDANT'S EXHIBIT NO. 2

Notice of Termination of Lease

To: Leo Lebenbaum:

Whereas, on the 15th day of December, 1943, the undersigned, Paul Gawzner and Irene Gawzner, as lessors, and you, as lessee, executed a certain written lease dated December 15, 1943, upon certain premises in El Montecito, County of Santa Barbara, State of California, commonly known and described as Miramar Hotel and bungalows, including the improvements situated upon said property, and all furniture, furnishings, tool implements, and other personal property used in the operation of said hotel, all as more particularly described in said written lease to which reference is hereby made for further particulars; and

Whereas, said lease was for the term of five (5) years and fifteen (15) days, commencing on the

Defendants' Exhibit No. 2—(Continued)

15th day of December, 1943, and contained an option to renew the same for an additional term of five (5) years upon the said terms and conditions as set forth in said lease; and

Whereas, Clause Thirty-one of said lease provides in effect that the tenant shall be entitled to the quiet and peaceable possession of the leased premises for the term thereof so long as the tenant shall not be in default; and

Whereas, Paragraph Ten of said lease provides as follows:

“Condemnation. The Lessee has heretofore been informed and knows that the State of California has heretofore acquired from Lessors, by deed recorded in Book 552, Page 275, Official Records of Santa Barbara County, California, and is the owner of, a strip of land adjoining U. S. Highway 101 which is presently being used by Lessors for hotel purposes but which may ultimately be put to highway uses by the State of California. In the event the State of California or the County of Santa Barbara or any other public body shall by condemnation acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the Lessors, but Lessors shall pay any and all

Defendants' Exhibit No. 2—(Continued)
assessments levied in any such condemnation proceeding. In the event any such condemnation suit shall include any buildings upon said leased premises, said Lessors, at their sole cost and expense, shall relocate the same upon said leased premises in some place mutually agreeable. Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the the subsequent use of the beach forming part of the lease' premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other."

And,

Whereas, the undersigned are the owners of the fee title to said leased premises and personal property; and

Whereas, on or about July 10, 1944, the undersigned were notified that Henry L. Stimson, Secretary of War of the United States of America, and requesting officer of United States of America, selected said leased premises and personal property and certain other premises owned by the undersigned for use for military purposes under authority of the Second War Powers Act (Act of Congress approved March 27, 1942, Public Law 507—77th Congress); and

Defendants' Exhibit No. 2—(Continued)

Whereas, on July 10, 1944, pursuant thereto, the United States of America, through the said Secretary of War and the army of the United States, took possession of all of said leased premises and personal property for said purposes; and

Whereas, on or about July 10, 1944, there was filed in the District Court of the United States, in and for the Southern District of California, Central Division, a complaint in condemnation, entitled "United States of America, plaintiff, v 21 Acres of Land, etc. et al.," and numbered in the records of said Court No. 3752-H Civil, which complaint covers the said leased premises and personal property and other premises owned by the undersigned; and

Whereas, said complaint recites as follows:

"That the estate or interest to be taken in the hereinabove referred to and hereinafter described property is for a term of years ending June 30, 1945, extendible for yearly periods thereafter during the existing national emergency at the election of the United States of America, notice of which election shall be filed in the above entitled proceeding at least thirty days prior to the end of the term hereby taken or subsequent extensions thereof. . . ."

And

Whereas, by reason of the foregoing, it has be-

Defendants' Exhibit No. 2—(Continued)

come impossible for the undersigned to perform in accordance with the terms of said lease, and particularly without limiting the generality of the foregoing, to keep the tenant in quiet and peaceable possession; and

Whereas, the consideration of said lease, to-wit, the possession of said premises, has failed without fault or act of the undersigned; and

Whereas, the undersigned by reason of Paragraph Ten of said lease is entitled to cancel and terminate the same; and

Whereas, by reason of the law and the facts, the undersigned is entitled to cancel and terminate said lease.

Now Therefore, by reason of the premises You Are Hereby Notified that said lease is cancelled and terminated, and that said cancellation and termination shall be effective thirty (30) days after service of this notice upon you.

This notice is being served upon you by registered mail in accordance with Paragraph Twenty-four of said lease.

Dated: August 4, 1944.

/s/ PAUL GAWZNER,

/s/ IRENE GAWZNER.

DEFENDANTS' EXHIBIT A

Leo Lebenbaum, Lessee
Miramar Hotel
Santa Barbara, California
Financial Statement
Final

[Letterhead]

Horwath & Horwath
Accountants and Auditors
Subway Terminal Building
417 South Hill Street
Los Angeles, Calif.

December 6, 1944

Mr. Leo Lebenbaum, Proprietor,
Miramar Hotel
Santa Barbara, California

Dear Sir:

From data which you submitted we have revised our report of October 6, 1944 covering operations for the first fifteen days of July, 1944 and the period January 1 to July 15, 1944.

The revised report submitted herewith exhibits a balance sheet as at October 1, 1944 and a general profit and loss statement with supporting schedules for the periods first above mentioned.

The exhibits and schedules are listed in an accompanying index.

The only changes effected, recording inventories

you reported to us, resulted in a reduction in cost of beverages sold for the half month and year to-date and an increase in other income arising from the sale of general supplies.

Other items indicated on your report on inventories and sales to the government has been taken into account in our previous report.

We did not examine into compliance with war-time laws and regulations relating to salary and wage adjustments, price ceilings, rationing, priorities and similar restrictions.

Very truly yours,

HORWATH & HORWATH.

Our reports and certificates are issued with the understanding that they will not be published in whole or in part, nor used in connection with the issuance of any securities, without our written consent.

Defendant's Exhibit A—(Continued)

EXHIBIT A
LEO LEBENBAUM, LESSEE
Miramar Hotel
Balance Sheet
as at October 1, 1944
ASSETS

Current Assets

| | | |
|---|-------------|-------------|
| Cash on Deposit—First National Bank..... | \$ 3,199.60 | |
| Accounts Receivable | | |
| Trade Vendors—Schedule A-1.. | \$1,982.90 | |
| Collection of Internal Revenue | 27.73 | |
| Paul Gawzner | 40.16 | |
| Advances to Improvement Fund | 152.32 | |
| Returned Checks | 265.00 | 2,468.11 |
| | | |
| Inventories | | |
| Beverages | \$2,430.00 | |
| Food, etc | 882.00 | 3,312.00 |
| | | |
| Deposits | | |
| Southern California Edison Company | \$ 350.00 | |
| Montecito Water District..... | 5.00 | |
| Chlorine Cylinders | 61.50 | 416.50 |
| | | |
| Total Current Assets..... | | \$ 9,396.21 |
| Restricted Funds on Deposit | | |
| Leasehold Improvements | \$ 16.95 | |
| Furnishings Replacement | 2,250.00 | 2,266.95 |
| | | |
| Other Assets | | |
| Unamortized Leasehold Cost..... | \$17,685.94 | |
| Unamortized Leasehold Improvements..... | 2,997.51 | 20,683.45 |
| | | |
| Prepayments—Schedule A-2 | | 673.39 |
| Total | | \$33,020.00 |

Defendant's Exhibit A (Continued)

LIABILITIES AND CAPITAL

In Pencil] : 1944 July 1—July 15 and Jan. 1—July 15

| | | |
|---|-------------|-------------|
| Current Liabilities | | |
| Accounts Payable—Nade—Schedule A-3.... | \$ 1,249.92 | |
| Sales Tax Collected..... | 73.76 | |
| Loan Payable—Wells Fargo Bank..... | 18,500.00 | |
| Accruals | | |
| Payroll Taxes | \$ 135.23 | |
| Rent | 1,336.60 | |
| Compensation Insurance | 314.71 | |
| Accountant Fees | 350.00 | 2,136.54 |
| | <hr/> | <hr/> |
| Total Current Liabilities..... | | \$21,960.22 |
| Reserve for Leaschold Improvements..... | | 16.95 |
| Capital | | |
| Balance December 31, 1943..... | \$12,160.34 | |
| Add | | |
| Net Profit Calendar Year 1944 To-Date.... | 8,482.67 | |
| | <hr/> | <hr/> |
| Total | | \$20,643.01 |
| Deduct | | |
| Proprietors' Withdrawals | 9,600.18 | |
| | <hr/> | <hr/> |
| Net Worth | | 11,042.83 |
| | | <hr/> |
| Total | | \$33,020.00 |
| | | <hr/> <hr/> |

Defendant's Exhibit A—(Continued)

SCHEDULES A-1, A-2, A-3

LEO LEBENBAUM, LESSEE

Miramar Hotel

SCHEDULE A-1

ACCOUNTS RECEIVABLE—TRADE VENDORS

| | | | |
|---|----------|--------|-------------|
| Lion Match Company..... | \$ | 27.12 | |
| Julliard Cockroft | | 182.83 | |
| Pepsi-Cola Company | | 14.65 | |
| Kayco | | 30.00 | |
| Johnson and Higgins..... | | 300.00 | |
| Eng. Skell | | 36.90 | |
| Santa Barbara Distributing Company..... | | 89.96 | |
| U. S. Army | | | |
| Food, etc | \$801.44 | | |
| General Supplies | 500.00 | | 1,301.44 |
| | | | <hr/> |
| Total | | | \$1,982.90 |
| | | | <hr/> <hr/> |

SCHEDULE A-2

PREPAYMENTS

| | | | |
|----------------------------|---------|----------|-------------|
| Unexpired Insurance | | \$249.75 | |
| Licenses and Taxes..... | | 196.10 | |
| Personal Property Tax..... | | 80.59 | |
| Prepaid Advertising | | | |
| Outdoor | \$11.29 | | |
| Magazine | 2.10 | | 13.39 |
| | | | <hr/> |
| Telephone | | 81.66 | |
| Dues | | 51.90 | |
| | | | <hr/> |
| Total | | | \$673.39 |
| | | | <hr/> <hr/> |

SCHEDULE A-3

ACCOUNTS PAYABLE—NADE

| | | | |
|---------------------------------------|----|--------|-------------|
| Pacific Coast Publishing Company..... | \$ | 17.40 | |
| Banks Typewriter Exchange | | 5.00 | |
| News Press Publishing Company..... | | 25.00 | |
| Oets Hardware Company..... | | 491.64 | |
| Santa Barbara Glass Company..... | | 7.18 | |
| Horwath & Horwath..... | | 409.60 | |
| Barker Bros. | | 155.55 | |
| Diamond Match Company..... | | 20.00 | |
| Vomkitts | | 1.69 | |
| Los Angeles Examiner..... | | 53.58 | |
| Dohrman Hotel Supply..... | | 3.28 | |
| Jean Schenek | | 60.00 | |
| | | | <hr/> |
| Total | | | \$1,249.92 |
| | | | <hr/> <hr/> |

Exhibit A—(Continued)

| LEO LEBENBAUM, LESSEE | | | | | | | | | | | |
|---|-----------------|-------------|-------------------------|-------------|----------------|----------------|----------------------------|---------------|--------------|----------------|----------------|
| Miramar Hotel | | | | | | | | | | | |
| General Profit and Loss Statement | | | | | | | | | | | |
| July 1 to July 15, 1944 | | | | | | | | | | | |
| | Schedule Number | Net Sales | July 1 to July 15, 1944 | | | | January 1 to July 15, 1944 | | | | |
| | | | Cost of Sales | Payroll | Other Expenses | Profit or Loss | Net Sales | Cost of Sales | Payroll | Other Expenses | Profit or Loss |
| Operating Departments | | | | | | | | | | | |
| Gas | B-1 | \$ 6,084.36 | | \$ 1,468.56 | \$ 671.24 | \$ 3,944.56 | \$ 60,196.42 | | \$ 12,891.39 | \$ 6,815.32 | \$ 40,489.71 |
| Food | B-2 | 1,966.12 | \$ 442.99 | 729.93 | 316.82 | 476.38 | 22,152.32 | \$ 8,594.49 | 7,857.29 | 3,919.99 | 1,780.55 |
| Garages | B-3 | 5,087.84 | 969.75 | 516.83 | 922.39 | 2,678.87 | 58,418.73 | 16,903.94 | 4,852.81 | 9,769.03 | 26,952.95 |
| Bar Stand | B-4 | 140.60 | 45.00 | | | 95.60 | 1,145.53 | 891.18 | | | 254.35 |
| Telephone | B-5 | 289.02 | 312.85 | | | — 23.83 | 2,868.54 | 2,784.08 | | | 84.46 |
| Total Operated Departments | | \$13,567.94 | \$1,770.59 | \$2,715.32 | \$1,910.45 | \$7,171.58 | \$144,781.54 | \$29,173.69 | \$25,601.49 | \$20,444.34 | \$69,562.02 |
| Net Income | B-6 | 1,763.88 | | | | 1,763.88 | 2,250.17 | | | | 2,250.17 |
| Operating Income | | | | | | \$8,935.46 | | | | | \$71,812.19 |
| Deductions From Income | | | | | | | | | | | |
| Administrative and General Expenses | B-7 | | | \$ 240.83 | \$ 893.66 | | | | \$ 2,359.43 | \$ 6,850.94 | |
| Advertising and Business Promotion | B-8 | | | | 417.71 | | | | | 1,948.09 | |
| Heat, Light and Power | B-9 | | | | 144.96 | | | | | 4,838.28 | |
| Total Deductions | | | | \$ 240.83 | \$1,456.33 | 1,697.16 | | | \$ 2,359.43 | \$13,637.31 | 15,906.74 |
| Net House Income, Expense and Profit Before Repairs and Maintenance | | \$15,331.82 | \$1,770.59 | \$2,956.15 | \$3,366.78 | \$7,238.30 | \$147,031.71 | \$29,173.69 | \$27,960.92 | \$34,081.65 | \$55,815.45 |
| Repairs and Maintenance | B-10 | | | 766.58 | 1,338.18 | 2,104.76 | | | 7,419.02 | 6,241.27 | 13,660.29 |
| Net House Income, Expense and Profit Before Taxes and Insurance | | \$15,331.82 | \$1,770.59 | \$3,722.73 | \$4,704.96 | \$5,133.54 | \$147,031.71 | \$29,173.69 | \$35,379.94 | \$40,322.92 | \$42,155.16 |
| Taxes and Insurance | B-11 | | | | | 2,911.26 | | | | | 30,004.53 |
| Net Before Interest and Amortization | | | | | | \$2,222.28 | | | | | \$11,250.63 |
| Interest | B-11 | | | | | 48.04 | | | | | — 365.65 |
| Net Before Amortization | | | | | | \$2,174.24 | | | | | \$10,884.98 |
| Amortization of Leasehold Cost and Improvements | B-11 | | | | | 193.31 | | | | | 2,402.31 |
| Net Profit—Exhibit A | | | | | | \$1,980.93 | | | | | \$ 8,482.67 |

[In Pencil]: "Peak" months of this business are July, Aug., Sept.

Defendant's Exhibit A—(Continued)

SCHEDULE B-1

LEO LEBENBAUM, LESSEE

Miramar Hotel

Departmental Profit and Loss Statement

ROOMS

| | Amounts | | Percentages | |
|-------------------------------|-------------------------------|-----------------|-------------------------------|-----------------|
| | July 1 to July 15, 1944 | Year To-Date | July 1 to July 15, 1944 | Year To-Date |
| Gross Sales | \$6,154.36 | \$62,220.80 | 101.15% | 103.36% |
| Allowances | 70.00 | 2,024.38 | 1.15 | 3.36 |
| Net Sales | \$6,084.36 | \$60,196.42 | 100.00% | 100.00% |
| Departmental Expenses | | | | |
| Salaries and Wages | \$1,468.56 | \$12,891.39 | 24.14% | 21.42% |
| Employees' Meals | 134.65 | 1,309.62 | 2.21 | 2.18 |
| Laundry | 209.60 | 2,632.85* | 3.44 | 4.37 |
| Dry Cleaning | | 62.40 | | .10 |
| Uniforms | | 1.48 | | |
| Cleaning Supplies | 31.79 | 245.25 | .52 | .41 |
| Printing and Stationery | | 75.43 | | .12 |
| Decorations | | 22.41 | | .04 |
| Guest Supplies | 68.73 | 677.62* | 1.13 | 1.13 |
| Commissions | | 164.45 | | .27 |
| Keys | | 89.16 | | .15 |
| Linen | 213.97 | 1,296.00* | 3.52 | 2.15 |
| Contract Cleaning | 12.50 | 165.75 | .21 | .28 |
| Miscellaneous | | 72.90 | | .12 |
| Total Expenses | \$2,139.80 | \$19,706.71 | 35.17% | 32.74% |
| Departmental Profit..... | \$3,944.56 | \$40,489.71 | 64.83% | 67.26% |

Defendant's Exhibit A—(Continued)

SCHEDULE B-2

LEO LEBENBAUM, LESSEE
Miramar Hotel

Departmental Profit and Loss Statement

FOOD

| | Amounts | | Percentages | |
|----------------------------|-------------------------------|-----------------|-------------------------------|-----------------|
| | July 1 to July 15, 1944 | Year To-Date | July 1 to July 15, 1944 | Year To-Date |
| Sales | | | | |
| Dining Room | \$1,971.27 | -\$22,115.99 | 100.26% | 99.84% |
| Room Service | 2.75 | 172.32 | .14 | .77 |
| Total Sales | \$1,974.02 | \$22,288.31 | 100.40% | 100.61% |
| Allowances | 7.90 | 135.99 | .40 | .61 |
| Net Sales | \$1,966.12 | \$22,152.32 | 100.00% | 100.00% |
| Cost of Goods Sold | | | | |
| Cost of Goods Consumed..\$ | 786.64 | \$12,683.77 | 40.01% | 57.26% |
| Less: Cost of Employees' | | | | |
| Meals | 343.65 | - 4,089.28 | 17.48 | 18.46 |
| Cost of Goods Sold..\$ | 442.99 | \$ 8,594.49* | 22.53% | 38.80% |
| Gross Profit | \$1,523.13 | \$13,557.83 | 77.47% | 61.20% |
| Departmental Expenses | | | | |
| Salaries and Wages.....\$ | 729.93 | \$ 7,857.29 | 37.13% | 35.47% |
| Employees' Meals | 125.00 | 1,673.22 | 6.36 | 7.54 |
| Laundry | 65.60 | 1,010.94 | 3.34 | 4.60 |
| Fuel | | 374.13 | | 1.69 |
| Utensils | 3.28 | 86.68 | .17 | .39 |
| Cleaning Supplies | 90.81 | 297.10 | 4.61 | 1.33 |
| Contract Cleaning | | 37.50 | | .17 |
| Paper Supplies | 7.74 | 74.94 | .39 | .34 |
| Glassware | 24.39 | 65.99 | 1.24 | .29 |
| Decorations | | 26.04 | | .12 |
| Menus | | 30.97 | | .13 |
| China | | 131.00 | | .59 |
| Silver | | 64.74 | | .29 |
| Miscellaneous | | 46.74 | | .21 |
| Total Expenses | \$1,046.75 | \$11,777.28 | 53.24% | 53.16% |
| Departmental Profit.....\$ | 476.38 | \$ 1,780.55 | 24.23% | 8.04% |

Defendant's Exhibit A—(Continued)

SCHEDULE B-3

LEO LEBENBAUM, LESSEE
Miramar Hotel

Departmental Profit and Loss Statement

BEVERAGES

| | Amounts | | Percentages | |
|----------------------------|-------------------------------|-----------------|-------------------------------|-----------------|
| | July 1 to July 15, 1944 | Year To-Date | July 1 to July 15, 1944 | Year To-Date |
| Sales | \$5,087.84 | \$58,418.73 | 100.00% | 100.00% |
| Cost of Goods Consumed.... | 969.75 | 16,903.94 | 19.06 | 28.94 |
| Gross Profit | \$4,118.09 | \$41,514.79 | 80.94% | 71.06% |
| Departmental Expenses | | | | |
| Salaries and Wages..... | \$ 516.83 | \$ 4,852.81 | 10.16% | 8.31% |
| Employees' Meals | 15.00 | 457.21 | .29 | .78 |
| Laundry | | 57.44 | | .10 |
| Ice | 56.58 | 608.65 | 1.11 | 1.04 |
| Bar Supplies | | 243.94 | | .42 |
| Glassware | 107.46 | 324.34 | 2.11 | .55 |
| Licenses and Taxes..... | 15.77 | 224.76 | .31 | .38 |
| Cabaret Tax | 617.57 | *5,938.97 | 12.14 | 10.17 |
| Watchman | | 245.00 | | .42 |
| Bartenders' Commission | | 270.38 | | .46 |
| Guest Supplies | | 25.67 | | .04 |
| Sales Tax | 110.01 | 1,296.17 | 2.17 | 2.22 |
| Miscellaneous | | 16.50 | | .03 |
| Total Expenses | \$1,439.22 | \$14,561.84 | 28.29% | 24.92% |
| Departmental Profit | \$2,678.87 | \$26,952.95 | 52.65% | 46.14% |

SCHEDULE B-4

CIGAR STAND

| | Amounts | | Percentages | |
|--------------------------|-------------------------------|-----------------|-------------------------------|-----------------|
| | July 1 to July 15, 1944 | Year To-Date | July 1 to July 15, 1944 | Year To-Date |
| Gross Sales | \$ 140.60 | \$ 1,160.58 | 100.00% | 101.31% |
| Allowances | | 15.05 | | 1.31 |
| Net Sales | \$ 140.60 | \$ 1,145.53 | 100.00% | 100.00% |
| Cost of Goods Sold..... | 45.00 | 891.18 | 32.01 | 77.80 |
| Departmental Profit..... | \$ 95.60 | \$ 254.35 | 67.99% | 22.20% |

Defendant's Exhibit A—(Continued)

SCHEDULE B-5

LEO LEBENBAUM, LESSEE

Miramar Hotel

Departmental Profit and Loss Statement

TELEPHONE

| | Amounts | | Percentages | |
|-----------------------------|-------------------------------|-----------------|-------------------------------|-----------------|
| | July 1 to July 15, 1944 | Year To-Date | July 1 to July 15, 1944 | Year To-Date |
| Gross Sales | | | | |
| Local Calls..... | \$ 74.50 | \$ 860.63 | 25.78% | 30.00% |
| Long Distance Calls..... | 214.52 | 2,022.51 | 74.22 | 70.51 |
| Total Gross Sales..... | \$ 289.02 | \$ 2,883.14 | 100.00% | 100.51% |
| Allowances | | 14.60 | | .51 |
| Net Sales | \$ 289.02 | \$ 2,868.54 | 100.00% | 100.00% |
| Cost of Calls | | | | |
| Long Distance | \$ 178.47 | \$ 1,866.88 | 61.75% | 65.08% |
| Rental of Equipment..... | 134.38 | 917.20 | 46.50 | 31.98 |
| Total Cost of Calls..... | \$ 312.85 | \$ 2,784.08 | 108.25% | 97.06% |
| Departmental Profit or Loss | \$ 23.83 | \$ 84.46 | 8.25% | 2.94% |

SCHEDULE B-6

OTHER INCOME

| | July 1 to July 15, 1944 | Year To-Date |
|-------------------------------|-------------------------------|-----------------|
| Valet | | \$ 7.29 |
| Guest Laundry | | 5.36 |
| Telegrams | \$ 10.91 | 9.08 |
| Radio | 2.00 | 35.00 |
| Vending Machines | 25.80 | 161.25 |
| Juke Box | 27.75 | 524.20 |
| Pin Ball | | 24.90 |
| Garage | 5.00 | 55.00 |
| Fire Wood | 180.50 | 14.90 |
| Cash Discounts Earned..... | | 44.14 |
| Cash Variations | 1.65 | 133.72 |
| Sales Tax | | .37 |
| Beach | 806.32 | 771.40 |
| Swimming Pool | | 3.50 |
| Miscellaneous | .25 | .25 |
| Fire Loss Adjustment..... | | 20.25 |
| Sale of General Supplies..... | 707.00 | 707.00 |
| Total Other Income..... | \$1,763.88 | \$2,250.17 |
| Ratio to Room Sales..... | 28.99% | 3.74% |

Defendant's Exhibit A—(Continued)

SCHEDULE B-7

LEO LEBENBAUM, LESSEE
Miramar Hotel

ADMINISTRATIVE AND GENERAL EXPENSES

| | July 1 to July 15, 1944 | Year To-Date |
|--|-------------------------------|-------------------|
| Salaries and Wages | \$ 240.83 | \$2,359.43 |
| Employees' Meals | 39.00 | 470.68 |
| Printing and Stationery..... | 80.38 | 368.91 |
| Telephone, Postage and Telegrams..... | 64.82 | 332.62 |
| Trade Association Dues..... | 11.97 | 156.15 |
| Office Supplies | | 153.98 |
| Classified Advertising | 53.58 | 214.15 |
| Auto and Truck Expense..... | 20.35 | 79.68 |
| Workmen's Compensation Insurance..... | 38.10 | 373.63 |
| General Insurance | 27.90 | 413.68 |
| Payroll Taxes | 165.92 | 1,624.80 |
| Accountants' Fees | 519.60 | 1,737.10 |
| Legal Fees | | 475.86 |
| Donations | | 50.00 |
| Traveling | | 50.00 |
| Bad Debts | | 11.18 |
| Miscellaneous | 1.68 | 338.52 |
| Total Administrative and General Expenses | <u>\$1,134.49</u> | <u>\$9,210.37</u> |
| Ratio to Room Sales..... | <u>18.65%</u> | <u>14.94%</u> |

SCHEDULE B-8

ADVERTISING AND BUSINESS PROMOTION

| | July 1 to July 15, 1944 | Year To-Date |
|---|-------------------------------|-------------------|
| Outdoor Signs | | \$ 330.00 |
| Magazines and Other Publications..... | \$ 49.96 | 536.14 |
| Literature | 352.75 | 745.02 |
| Guest Entertainment | | 94.33 |
| Miscellaneous | 15.00 | 33.00 |
| Preparation of Copy..... | | 209.60 |
| Total Advertising and Business Promotion | <u>\$417.71</u> | <u>\$1,948.09</u> |
| Ratio to Room Sales..... | <u>6.87%</u> | <u>3.16%</u> |

Defendant's Exhibit A (Continued)

SCHEDULE B-9

LEO LEBENBAUM, LESSEE

Mirmar Hotel

HEAT, LIGHT AND POWER

| | July 1 to July 15, 1944 | Year To-Date |
|----------------------------------|-------------------------------|-------------------|
| Engineering Supplies | | \$ 334.00 |
| Electric Current | | 1,617.91 |
| Electric Bulbs | | 175.00 |
| Fuel | \$ 76.06 | 1,977.66 |
| Water | 56.90 | 579.74 |
| Removal of Waste Matter..... | 12.00 | 214.00 |
| Total | <u>\$144.96</u> | <u>\$4,898.31</u> |
| Less: Sale of Fuel | | 60.03 |
| Total Heat, Light and Power..... | <u>\$144.96</u> | <u>\$4,838.28</u> |
| Ratio to Room Sales..... | <u>2.38%</u> | <u>7.85%</u> |

SCHEDULE B-10

REPAIRS AND MAINTENANCE

| | July 1 to July 15, 1944 | Year To-Date |
|--------------------------------------|-------------------------------|--------------------|
| Salaries and Wages..... | \$ 766.58 | \$ 7,419.02 |
| Employees' Meals | 30.00 | 178.55 |
| Furniture Store | 664.32 | 1,467.19 |
| Carpets and Rugs..... | | 125.87 |
| Curtains, Shades and Drapes..... | 80.65 | 726.22 |
| Painting and Decorations..... | 1.69 | 301.09 |
| Electrical and Mechanical..... | 469.43 | 1,609.75 |
| Auto and Truck..... | | 112.76 |
| Electrical Signs (Contract)..... | 37.50 | 262.50 |
| Springs, Mattresses and Pillows..... | | 819.75 |
| Building | | 250.55 |
| Grounds and Gardens..... | 54.59 | 387.04 |
| Total Repairs and Maintenance..... | <u>\$2,104.76</u> | <u>\$13,660.29</u> |
| Ration to Room Sales..... | <u>34.59%</u> | <u>22.16%</u> |

Defendant's Exhibit A (Continued)

SCHEDULE B-11

LEO LEBENBAUM, LESSEE
Miramar Hotel

CAPITAL EXPENSES

| | July 1 to July 15, 1944 | Year To-Date |
|---------------------------------|-------------------------------|--------------------|
| Rent, Taxes and Insurance | | |
| Rent | \$2,888.13 | \$30,435.83 |
| Personal Property Taxes..... | 3.84 | 11.52 |
| Insurance | 19.29 | 457.18 |
| Total | <u>\$2,911.26</u> | <u>\$30,904.53</u> |
| Interest | | |
| 3%—90 Day (Renewable) Note..... | \$ 48.04 | \$ 365.65 |
| Amortization | | |
| Leasehold Cost | \$ 165.29 | \$ 2,148.77 |
| Leasehold Improvements | 28.02 | 253.54 |
| Total | <u>\$ 193.31</u> | <u>\$ 2,402.31</u> |
| Total Capital Expenses..... | <u>\$3,152.61</u> | <u>\$33,672.49</u> |

DEFENDANTS' EXHIBIT B

Miramar Hotel
Santa Barbara, California
Estimated Statement of Profit and Loss for
the Year Ended July 10, 1945

[Letterhead]

Horwath & Horwath
Accountants and Auditors
Subway Terminal Building
417 South Hill Street
Los Angeles 13, Calif.

September 18, 1947

Miramar Hotel
Santa Barbara, California

Gentlemen:

In accordance with our engagement, we have prepared an estimated statement of profit and loss of the Miramar Hotel for the year ended July 10, 1945.

The basis of this statement has been actual results at the Miramar in previous periods augmented by National averages indicated in Horwath and Hor-

wath's publications Hotel Operations in 1944 and 1945 and adjusted to results achieved in similar hotels during the period under review.

The results indicate a profit of \$176,117.95 divided between lessor and lessee as follows:

| | | |
|--------------------------|--------------|---------|
| Landlord (Rent)..... | \$ 91,648.02 | 52.04% |
| Tenant (Remainder) | 84,469.93 | 47.96 |
| | <hr/> | <hr/> |
| Total | \$176,117.95 | 100.00% |
| | <hr/> | <hr/> |

Very truly yours,
HORWATH & HORWATH.

Our reports and certificates are issued with the understanding that they will not be published in whole or in part, nor used in connection with the issuance of any securities, without our written consent.

Comments

Rooms

Room sales were computed on the basis of 130 rooms available for rental at 94 per cent occupancy with an average daily rate of \$4.53.

There were 134 rooms in the hotel. Of this total 4 were set aside for use by the management and

employees customarily receiving room and board.

The determination of a 94 per cent occupancy was made on the basis of Pacific Coast occupancy data compiled by Horwath and Horwath and occupancy shown by Santa Barbara hotels and similar so called resorts in Southern California. This was the occupancy figure used in the Mar Monte Hotel case before Judge McCormick and substantiated in Federal Court.

The average daily rate per occupied room, \$4.53, is the average of rates appearing on the room rack as at June 10, 1944.

Departmental expenses and profit represent normal figures and are in line with similar operations during this period.

Food

Food sales were established on the basis of 32.3 per cent of room sales, the ratio in effect at the Miramar in July, 1944.

Food cost of 42 per cent, expenses and departmental profit represent normal expectancy from this operation.

Beverages

Beverage sales were computed at 83.6 per cent of room sales, the existing ratio at the time the Miramar was taken over.

Beverage cost of 33 per cent, expenses and departmental profit represent normal expectancy.

Beach Club

Sales, costs and expenses are purely conservative

estimates as these facilities were in use but a short while prior to army occupancy.

The results from this department are, however, not material to the operation as a whole.

Other Departments

Loss from telephone and other income have been eliminated as these would offset one another.

Various expense classifications follow with the percentage of room sales that each represents. These are experience factors.

| | |
|--|-------|
| Administrative and General | 12.2% |
| Advertising and Business Promotion | 3.0 |
| Heat, Light and Power | 5.8 |
| Repairs and Maintenance | 10.1 |

Rent

Rent, as presented on Schedule 5, was computed in accordance with the lease in effect and by use of the stated percentages.

Conclusion

The profit and loss statement indicates a house profit of \$176,117.95. Rent, or the landlord's share, amounts to \$91,648.02 with the remainder of \$84,469.93 representing the tenants' profit. Reduced to percentages, this means that the landlord would receive 52.04 per cent of the income and the tenant 47.96 per cent.

Miramar Hotel
 Santa Barbara, California
 Estimated General Profit and Loss Statement
 Year Ended July 10, 1945

| | Schedule | Net Sales | Cost of Sales | Expenses | Profit or Loss |
|--|----------|--------------|------------------|--------------|-------------------|
| Operated Departments | | | | | |
| Rooms | 1 | \$202,053.05 | | \$ 44,249.66 | \$157,803.39 |
| Food | 2 | 65,263.12 | \$27,410.51 | 39,288.40 | —1,435.79 |
| Beverages | 3 | 168,918.31 | 55,743.04 | 40,033.64 | 73,141.63 |
| Beach Club | 4 | 15,300.00 | 4,391.00 | 1,461.80 | 9,447.20 |
| Total Operated Departments..... | | \$451,534.48 | \$87,544.55 | \$125,033.50 | \$238,956.43 |
| Deductions from Income | | | | | |
| Administrative and General Expense.. | | | | \$ 24,650.47 | |
| Advertising and Business Promotion.... | | | | 6,061.59 | |
| Heat, Light and Power..... | | | | 11,719.07 | |
| Total Deductions | | | | \$ 42,431.13 | |
| Repairs and Maintenance..... | | | | \$ 20,407.35 | 62,838.48 |
| Total House Profit..... | | \$451,534.48 | \$87,544.55 | \$187,871.98 | \$176,117.95 |
| Rent (Lessor) | 5 | | | | 91,648.02 |
| Net Profit Available to Lessee..... | | | | | \$ 84,469.93 |

SCHEDULE 1

MIRAMAR HOTEL
ROOMS

| | Amounts | Percentages |
|---------------------------|--------------|-------------|
| Net Sales | \$202,053.05 | 100.00% |
| <hr/> | | |
| Departmental Expenses | | |
| Salaries and Wages..... | \$ 28,893.63 | 14.3 |
| Employees' Meals | 1,010.27 | .5 |
| Laundry | 9,496.49 | 4.7 |
| Linen | 1,010.27 | .5 |
| Guest Supplies | 1,616.42 | .8 |
| Contract Cleaning | 808.21 | .4 |
| Cleaning Supplies | 606.16 | .3 |
| Other Expenses | 808.21 | .4 |
| | <hr/> | <hr/> |
| Total Expenses | \$ 44,249.66 | 21.9 % |
| | <hr/> | <hr/> |
| Departmental Profit | \$157,803.39 | 78.1 % |
| | <hr/> <hr/> | <hr/> <hr/> |

STATISTICS

| | |
|---|---------|
| Number of Rooms Available..... | 130 |
| Percentage of Occupancy..... | 94.00% |
| Average Daily Rate per Occupied Room..... | \$ 4.53 |

SCHEDULE 2

MIRAMAR HOTEL
FOOD

| | Amounts | Percentages |
|-------------------------------------|-------------|-------------|
| Net Sales | \$65,263.12 | 100.00% |
| Cost of Goods Sold..... | 27,410.51 | 42.00 |
| | <hr/> | <hr/> |
| Gross Profit | \$37,852.61 | 58.00% |
| <hr/> | | |
| Departmental Expenses | | |
| Salaries and Wages..... | \$32,044.19 | 49.1 % |
| Employees' Meals | 2,675.79 | 4.1 |
| Laundry | 1,566.32 | 2.4 |
| Kitchen Fuel | 587.37 | .9 |
| China, Glass, Silver and Linen..... | 456.84 | .7 |
| Cleaning Expenses | 522.10 | .8 |
| Menus and Stationery..... | 261.05 | .4 |
| Other Expenses | 1,174.74 | 1.8 |
| | <hr/> | <hr/> |
| Total Expenses | \$39,288.40 | 60.2 % |
| | <hr/> | <hr/> |
| Departmental Loss | \$—1,435.79 | —2.2 % |
| | <hr/> <hr/> | <hr/> <hr/> |

SCHEDULE 3

MIRAMAR HOTEL
BEVERAGES

| | Amounts | Percentages |
|---------------------------|--------------|-------------|
| Net Sales | \$168,918.31 | 100.00% |
| Cost of Sales..... | 55,743.04 | 33.00 |
| Gross Profit | \$113,175.27 | 67.00% |
| Departmental Expenses | | |
| Salaries and Wages..... | \$ 31,080.98 | 18.4 % |
| Employees' Meals | 506.75 | .3 |
| Laundry | 675.67 | .4 |
| Ice | 4,391.88 | 2.6 |
| Glassware | 506.75 | .3 |
| Licenses | 1,351.35 | .8 |
| Sundry Supplies | 1,013.51 | .6 |
| Other Expenses | 506.75 | .3 |
| Total Expenses | \$ 40,033.64 | 23.7 % |
| Departmental Profit | \$ 73,141.63 | 43.3 % |

SCHEDULE 4

MIRARMAR HOTEL
BEACH CLUB

| | Amounts | Percentages |
|---------------------------|-------------|-------------|
| Sales | | |
| Cabanas | \$ 6,000.00 | |
| Food | 4,800.00 | |
| Beverages | 2,400.00 | |
| Cigars | 2,100.00 | |
| Total Sales | \$15,300.00 | 100.00% |
| Cost of Sales | | |
| Food | \$ 2,016.00 | 42.0 % |
| Beverages | 800.00 | 33.3 |
| Cigars | 1,575.00 | 75.0 |
| Total Cost of Sales..... | \$ 4,391.00 | 28.7 % |
| Gross Profit | \$10,909.00 | 71.3 % |
| Departmental Expenses | | |
| Salaries and Wages..... | \$ 1,200.00 | 7.8 % |
| Employees' Meals | 90.00 | .6 |
| Guest Supplies | 91.80 | .7 |
| Other Expenses | 80.00 | .5 |
| Total Expenses | \$ 1,461.80 | 9.6 % |
| Departmental Profit | \$ 9,447.20 | 71.7 % |

SCHEDULE 5

MIRAMAR HOTEL
RENT

| | Sales | Rent | |
|-----------------------------------|--------------|-------------|-------------|
| Rooms | | | |
| 5 $\frac{1}{3}$ Months @ 35%..... | \$ 89,801.35 | \$31,430.46 | |
| 6 $\frac{2}{3}$ Months @ 30%..... | 112,251.70 | 33,675.50 | \$65,105.96 |
| | \$202,053.05 | | |
| | | | |
| Food | | | |
| Dining Room | \$ 65,263.12 | | |
| Beach | 4,800.00 | | |
| | | | |
| @ 5% | \$ 70,063.12 | | 3,503.16 |
| Beverages | | | |
| Bar | \$168,918.31 | | |
| Beach | 2,400.00 | | |
| | \$171,318.31 | | |
| 5 $\frac{1}{3}$ Months @ 15%..... | 76,141.47 | 11,421.22 | |
| 6 $\frac{2}{3}$ Months @ 10%..... | 95,176.84 | 9,517.68 | 20,938.90 |
| | \$171,318.31 | | |
| | | | |
| Beach—Cabanas @ 35%.... | | | 2,100.00 |
| Total Rent | | | \$91,648.02 |
| | | | |

The lease calls for a percentage rent on sales as follows:

| | |
|-----------------|-----|
| Rooms | 35% |
| Food | 5% |
| Beverages | 15% |
| Cabanas | 35% |

If during any calendar year the total percentage rent reaches \$45,000.00 the percentages on rooms and beverages are reduced 5% each for the balance of that year. In the above computation, percentage rent reached \$45,000.00 on approximately June 10 on a calendar year basis.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 308, inclusive, contain the original Order to Deposit Funds Under Military Appropriations Act; Memorandum of Conclusions, Judge Hollzer, June 30, 1945; Notice of Motion for an Order Directing the Plaintiff to Deliver Possession of Premises to Defendant Leo Lebenbaum; Notice of Motion for an Order Excluding Certain Defendants from Participation in Trial Proceedings; Notice of Motion for an Order Releasing Deposited Funds; Notice of Opposition to Order Directing the Plaintiff to Deliver Possession of the Premises to the Defendant Leo Lebenbaum; Notice of Opposition to Order Releasing Deposited Funds; Memorandum of Conclusions—Judge Weinberger, April 30, 1946; Stipulation in re Surrender of Possession of Miramar Hotel to Leo Lebenbaum, Tenant; Stipulation in re Surrender of Possession of Portions of Property Taken by the United States; Receipt; Petition for Withdrawal of Funds on Deposit; Responsive Statement of Plaintiff in Connection with Defendant's Petition for Withdrawal of Funds on Deposit; Receipt; Third Amended Complaint in Condemnation; Stipulation for Judgment (Including Deficiency); Judgment and Decree in Condemnation (Including Deficiency); Stipula-

tion and Assignment of Interest in Award; Notice of Motion to File Answer to Third Amended Complaint and Cross Complaint, etc; Answer to Third Amended Complaint and Cross Complaint (including Exhibit B only); Answer of Defendant Leo Lebenbaum to Second Amended Complaint; Stipulation re Payment of Portion of Award and Order for Payment of Funds on Deposit with the Registry of the Court; Memorandum of Conclusions—Judge Weinberger, August 25, 1948; Letter dated October 6, 1948 to Judge Weinberger from Thomas H. Hearn; Letter dated October 13, 1948 to Judge Weinberger from Hill, Morgan & Farrer; Proposed Findings of Fact and Conclusions of Law Upon Distribution of Award Provided for by Judgment and Decree in Condemnation Proposed and Requested by Defendants Gawzner; Memorandum re Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment Upon Distribution of Award Provided for by Judgment and Decree in Condemnation; Notice of Appeal of Defendants Gawzner; Undertaking on Appeal and to Stay Execution; Notice of Appeal of Defendant Lebenbaum filed May 13, 1949; Costs Bond on Appeal; Notice of Appeal of Defendant Lebenbaum filed May 16, 1949; Stipulation and Order for Extension of Time for Filing Records on Appeal and Docketing Appeals; Personal Stay Bond; Stipulation and Order for Extension of Time for Filing Records on Appeal and

Docketing Appeals and Joint Designation and Stipulation for Transcript of Record; Stipulation as to Record on Appeal; Concise Statement of Points on Which Defendants and Appellants Paul and Irene Gawzner Intend to Rely on Appeal and Statement of Points on Appeal of Defendant Leo Lebenbaum and full, true and correct copies of Minute Orders Entered April 30, 1946 and September 20, 1948 which, together with copy of reporter's transcript of proceedings on January 17, 1947, February 28, 1947, March 18, 19, 20, and 21, 1947, April 25, 1947, May 12, 1947, June 6, 1947, August 14, 1947, October 22, 1947 and January 23, 1948 and original Defendants Gawzner exhibits 1, 2 and 3 and original Defendant Lebenbaum exhibits A and B, transmitted herewith, constituted the record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.40 which sum has been paid one-half by each of the appellants and cross-appellant.

Witness my hand and the seal of said District Court this 22nd day of July, A.D. 1949.

[Seal]

EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12299. United States Court of Appeals for the Ninth Circuit. Paul Gawzner and Irene Gawzner, Appellants, vs. Leo Lebenbaum, Appellee. Leo Lebenbaum, Appellant, vs. Paul Gawzner and Irene Gawzner, Appellees. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed July 23, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit
No. 12,299

PAUL GAWZNER, et ux.,
Appellants.

vs.

LEO LEBENBAUM,
Appellee.

LEO LEBENBAUM,
Appellant,

vs.

PAUL GAWZNER, et ux.,
Appellees.

STATEMENT OF POINTS ON APPEAL TO BE
RELIED UPON IN THIS COURT

Appellant, Leo Lebenbaum, adopts the Statement

of Points on Appeal filed in the District Court as his Statement of Points to be relied upon in this Court.

Dated: July 29, 1949.

PAUL R. COTE,

By /s/ PAUL R. COTE,

Attorney for Appellant,
Leo Lebenbaum.

Received copy of the within document this 29th day of July, 1949.

HILL, MORGAN & FARRER
STANLEY S. BURRILL,

By /s/ STANLEY S. BURRILL,

Attorneys for Paul and
Irene Gawzner.

[Endorsed]: Filed Aug. 2, 1949.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF POINTS ON
WHICH APPELLANTS AND CROSS AP-
PELLEES INTEND TO RELY.

Now Come Paul Gawzner and Irene Gawzner, Appellants and Cross Appellees, and adopt the

Concise Statement of the Points on which Defendants and Appellants Paul Gawzner and Irene Gawzner intend to rely on appeal, filed in the District Court and already appearing as a part of the record on appeal herein, as the Concise Statement of Points on which they intend to rely on this appeal.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL.

By /s/ STANLEY S. BURRILL,

Attorneys for Appellants and Cross Appellees Paul
Gawzner and Irene Gawzner.

Received a copy of the foregoing this 29th day of
July, 1949.

PAUL R. COTE,
By /s/ PAUL R. COTE,

Attorney for Cross Appellant and Appellee Leo
Lebenbaum.

[Endorsed]: Filed Aug. 2, 1949.

[Title of Court of Appeals and Cause.]

JOINT DESIGNATION OF RECORD
TO BE PRINTED

It Is Hereby Stipulated by and between Paul
Gawzner and Irene Gawzner, Appellants and Cross

Appellees, and Leo Lebenbaum, Cross Appellant and Appellee, through their respective counsel, that the following joint designation shall constitute the record which is material to the consideration of the appeal and cross appeal in the above entitled cause:

To the Clerk of the Above Entitled Court:

You Are Hereby Requested and Directed to cause to be printed as the record on appeal in the above entitled cause the parts of the record, proceedings and evidence transmitted to you by the Clerk of the District Court and set forth in the Joint Designation and Stipulation for Transcript of Record, except as follows:

1. In Designation No. 4 please omit Paragraphs VI to XIX, inclusive, of the Cross Complaint of Paul Gawzner and Irene Gawzner.

2. Please omit Designation No. 7.

3. Please omit Designation No. 19.

4. Please omit Designation No. 26.

(See Item 5 following.)

In addition to the foregoing record will you please cause to be printed as a part of the record the following:

5. Agreed Statement as to Record of Testimony transmitted to you herewith, being an agreed summary of the pertinent testimony included in the Reporter's Transcripts of the proceedings.

6. Concise Statement of Points on which Appellants and Cross Appellees intend to rely filed by Paul Gawzner and Irene Gawzner.

7. Statement of Points on Appeal to be relied upon in this Court filed by Leo Lebenbaum.

8. This Joint Designation of Record to be Printed.

Dated this 29th day of July, 1949.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL.

By /s/ STANLEY S. BURRILL,

Attorneys for Appellants and Cross Appellees Paul
Gawzner and Irene Gawzner.

PAUL R. COTE,

By /s/ PAUL R. COTE,

Attorney for Cross Appellant and Appellee Leo
Lebenbaum.

[Endorsed]: Filed Aug. 2, 1949.

No. 12299

United States
Court of Appeals
For the Ninth Circuit.

PAUL GAWZNER and IRENE GAWZNER,
Appellants,

vs.

LEO LEBENBAUM,
Appellee.

LEO LEBENBAUM,
Appellant,

vs.

PAUL GAWZNER and IRENE GAWZNER,
Appellees.

Transcript of Record

In Two Volumes

Volume II

Pages 341 to 489

Appeals from the United States District Court,
Southern District of California,
Central Division.

No. 12299

United States
Court of Appeals
For the Ninth Circuit.

PAUL GAWZNER and IRENE GAWZNER,
Appellants,

vs.

LEO LEBENBAUM,
Appellee.

LEO LEBENBAUM,
Appellant,

vs.

PAUL GAWZNER and IRENE GAWZNER,
Appellees.

Transcript of Record

In Two Volumes

Volume II

Pages 341 to 489

Appeals from the United States District Court,
Southern District of California,
Central Division.

In the United States District Court for the South-
ern District of California, Central Division
No. 3752-W—Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, etc., et al,

Defendants,

Honorable Jacob Weinberger, Judge presiding.

APPEARANCES

HILL, MORGAN & FARRER by

STANLEY S. BURRILL, ESQ.,

For the Defendants Gawzner.

PAUL R. COTE and

THOMAS H. HEARN, ESQ.,

For the Defendant Leo Lebenbaum.

AGREED STATEMENT AS TO RECORD
OF TESTIMONY

It is stipulated by and between appellants, Paul Gawzner and Irene Gawzner and appellant Leo Lebenbaum, through their respective counsel of record, that the following narrative statements and verbatim excerpts taken from the official reporter's transcripts of the proceedings of January 17, February 28, March 18, 19, 20 and 21, April 25, May 12, June 6, August 14 and October 22, all in 1947, and the proceedings of January 23, 1948, may be deemed to be all of the record of the testimony in this cause upon all of the issues presented by their respective appeals and that the same may be printed in lieu of portions of the above described transcripts of the record as their joint designation of the portion of the record of the testimony to be relied upon by them in such appeals.

PAUL R. COTE,

By /s/ PAUL R. COTE,

Attorney for defendant and cross appellant Leo Lebenbaum.

HILL, MORGAN & FARRER
and STANLEY S. BURRILL,

By /s/ STANLEY S. BURRILL,

Attorneys for defendants and appellants Paul Gawzner and Irene Gawzner. [1*]

Be It Remembered that this cause as to the distribution of the award fixed by the Judgment of

* Page numbering appearing at bottom of page of original certified Transcript of Record.

November 26, 1946, came on regularly for trial on the eighteenth day of March 1947, before the Honorable Jacob Weinberger, Judge of said Court, Hill, Morgan & Farrer, by Stanley S. Burrill, Esq., appearing as attorneys for the defendants Paul Gawzner and Irene Gawzner and Paul Cote and Thomas H. Hearn, by Thomas H. Hearn, Esq., appearing as attorneys for the defendant Leo Lebenbaum:

Whereupon the following proceedings were had and testimony, oral and documentary, was offered by the respective parties and admitted by the Court:

MOTION TO FILE ANSWER TO THIRD
AMENDED COMPLAINT AND CROSS-
COMPLAINT

By Mr. Burrill:

If your Honor please, at this time, if I may proceed, I move leave of the court to file, on behalf of the defendants and cross-complainants Paul Gawzner and Irene Gawzner, their answer to the third amended complaint and a cross-complaint, a copy of which has heretofore been served upon counsel for the defendant Lebenbaum and also upon the government. The motion is made upon the same grounds as the motion was made to place the cause off calendar, to wit, that the matter is not at issue between the cross-defendants Paul Gawzner and Irene Gawzner and Leo Lebenbaum. [2]

The Court: The record discloses that you are both in court as answering defendants to the complaint of the plaintiff.

Mr. Burrill: That is correct, if your Honor

please. And at this time I am asking leave of the court to file an answer, on behalf of the defendants Paul Gawzner and Irene Gawzner, to the third amended complaint of the government and for leave to file a cross-complaint against the defendant Lebenbaum.

That motion is made, if your Honor please, upon two bases; first, that the case is not at issue between any of the conflicting claims of the defendants Gawzner and the defendant Lebenbaum, and for the second reason that our procedure is controlled by State procedure in a condemnation proceeding, and it has been held by the appellate courts of the State of California that the proper procedure to follow in a condemnation action, where there are conflicting claims between defendants named in an eminent domain proceeding, is to answer the complaint and file a cross-complaint against the opposing defendant to raise the issues between them.

The cases have held that a cross-complaint against the condemning body was not a proper action; that all issues against the condemning body should be raised by an answer but that the issues between defendants in a condemnation proceeding should be raised by cross-complaint between those defendants.

(Argument by Mr. Burrill and discussion between Court and counsel omitted.)

The Court: What are your views, Mr. Hearn?

Mr. Hearn: If your Honor please, the defendant Lebenbaum opposes the filing of the proposed cross-complaint on the ground that the matter con-

tained in the proposed cross-complaint is not proper matter for a cross-complaint in a condemnation action in federal court for the following reasons, first, the proposed cross-complaint sets up only matters occurring since the government surrendered possession of the condemned property to the defendant Lebenbaum, pursuant to an order of this court.

(Argument by Mr. Hearn omitted.)

Second, that the proposed cross-complaint does not state facts sufficient to constitute a cause of action against the defendant Lebenbaum, which I will elaborate on in just a moment; and, third, that the cross-complaint shows on its face the pendency of two other actions which will determine the matters set forth in the cross-complaint, one of the actions being between these two defendants, in other words, the unlawful detainer action. And if for no other reason than that it discloses on its face another action pending, the cross-complaint is improper because the determination of the matters set forth in the cross-complaint must wait the determination of those other actions. [4]

(Argument by Mr. Hearn and discussion between Mr. Hearn and the Court omitted. Mr. Burrill's argument in reply omitted.)

The Court: In view of the fact that counsel for Lebenbaum has made no objection to the filing of the amended answer or, rather, the answer to the third amended complaint, that answer may be filed.

Now, I am just questioning the propriety of some

of the provisions of your cross-complaint. I don't think we should look to labels, or call it what you will, so long as the issues are framed and are before the court.

Mr. Burrill: I agree with your Honor and the cases so hold, that what you label it is no criterion.

The Court: I think your answer sets up your position that you have maintained throughout this litigation and that you are going to continue to maintain until the matter is finally settled, and you are within your rights to maintain those matters that you think are proper in your particular situation. But we now come to a situation that calls for a halt, as it were. We have two dates here that are significant and I don't think we should go beyond those dates. They were mentioned by Mr. Hearn this morning, and I think he was correct in that contention. One is the date of the fixing of the just compensation and the other was the date of the restoration costs. I think that is correct, is it not, Mr. Hearn, that those were the particular dates; that one [5] was in—I don't remember exactly the time but in 1946. The first date was in June some time, wasn't it?

Mr. Hearn: June 1st, your Honor.

The Court: And the last time is the time of the judgment and stipulation. Matters that have occurred since that time I don't think are properly before the court. So I don't think the court is called upon to go into speculative matters as to the anticipated results of litigation arising between these

people subsequent to those dates, for failure to comply with some other agreement, with which this court is not concerned and has not been concerned, which was made subsequent to the issues which are presented here. I don't think we are concerned with that matter. I think we should confine ourselves to the issues as made up and as advocated all of this time by both of these litigants prior to the last date, which is the date of judgment.

Mr. Burrill: May I call your Honor's attention to the fact that the agreement of July 23, 1946, was, of course, prior to the date of judgment by some months?

The Court: That may have been but that has to do with some other matters that were not involved in that condemnation proceeding.

Mr. Burrill: I can't agree with that but that is your Honor's ruling.

The Court: What are your views in that respect? Is that involved in the condemnation proceeding and within the [6] issues proper as defined prior to the alleged breach or prior even to the cause of action and that agreement?

Mr. Burrill: If your Honor please, there are two ways in which that is material. In the first place, it is material as between the parties to show that the acceptance of rent, subsequent to June 1, 1946, was not a waiver of that contention previously made by the defendants Gawzner in the case that the lease was cancelled.

The Court: You are not foreclosed from asserting that stand and that position.

Mr. Burrill: I must have the agreement to support it. Otherwise, if the evidence shows we have accepted rent subsequent to June 1, 1946, without the agreement, we would, necessarily, have had to waive our point that the lease was cancelled by the filing of the eminent domain proceeding. It is a very material point to us there and that was the reason for the agreement, if your Honor please, because at that time and when that agreement was fixed the defendant Lebenbaum was in possession of the premises and had tendered rent. The rent was returned to him and refused.

The Court: That happened some time before also, that is to say, at the earlier stages of this proceeding you contended that there was no lease; that it had been terminated?

Mr. Burrill: Yes; that is correct, and I am still contending it. [7]

The Court: And you took the position then there was no relationship between you folks as landlord and tenant?

Mr. Burrill: That is correct.

The Court: Then, why go into other matters between you folks that had to do with some other contract?

Mr. Burrill: If your Honor please, the reason for it is this, that, as a matter of law, had the defendants Gawzner accepted rent from the defendant Lebenbaum after he went into possession on June 1, 1946, they would, necessarily, have had to recognize their lease and would have waived the contention,

that they had heretofore made, that the lease was cancelled by the institution of the condemnation proceedings. Accordingly, they refused to accept the rent and advised the defendant Lebenbaum that, in their opinion, he was not lawfully in possession and that he would be held liable as a trespasser if they were successful in that contention, and, upon the basis of that dispute, the agreement of July 23, 1946, was entered into by and between the parties, and it provides for the acceptance of rent subsequent to June 1, 1946, and saves to the defendants Gawzner all rights they might contend for. It permits the defendant Lebenbaum to occupy the premises subsequent to June 1, 1946, and saves to him all of the rights he might maintain in this action.

The Court: Yes; but Lebenbaum went into possession as a result of an order of this court. [8]

Mr. Burrill: That is true, your Honor, but that was an order made prior to trial, in the nature of a pre-trial order, which legally is subject to your Honor's changing it.

The Court: Yes. And you are still asserting that situation in the trial and that the issues as made up in your answer and your position all the way along are that you are going to continue that assertion?

Mr. Burrill: Yes, your Honor.

The Court: And then the court will consider everything that is necessary to be considered in connection with that matter and other matters. But I am of the opinion now that we should not com-

plicate the issues by these other matters that I have mentioned, and this subsequent agreement is one of them. I am of that opinion at the moment.

Mr. Burrill: The materiality of it is what I have pointed out in the first place, and, secondly, the second materiality of it is that by that agreement the defendant Lebenbaum again obligated himself to comply with the terms of the lease, and that he has failed to do so, forgetting now the OPA situation; that he has failed to do so insofar as the restoration is concerned, and, having failed to do so in spite of his obligation, he is not entitled to share in the cost of restoration at least in excess of whatever he may have expended up to the time.

The Court: However, that issue you have submitted to the Superior Court in Santa Barbara. [9]

Mr. Burrill: No, your Honor. That is not the issue that has been submitted to the court in Santa Barbara. The issue that has been submitted to the court in Santa Barbara is the issue of the violation by virtue of the OPA overcharge. I think I am correct in that, am I not, Mr. Hearn? There have been so many things happen that it is difficult to remember but my recollection is that the case in Santa Barbara and the claim of violation there is dependent solely upon the alleged violation of the OPA regulations.

Mr. Hearn: I believe that is correct; that that is the only violation of the lease that is complained of.

The Court: I think I have expressed myself. I

may change my mind but that is my opinion for the moment.

Mr. Burrill: Very well, your Honor. And I will ask this only as a matter of record, if your Honor please. Do I understand there is a denial of the motion to file what is designated as a cross-complaint in full or——

The Court: In part.

Mr. Burrill: ——as to those things that occurred subsequent to November 26, 1946, which is the date of the entry of judgment?

The Court: I think that is the general idea. I can't remember every one of these paragraphs. It is impossible.

Mr. Burrill: I realize that and there are certain interblending paragraphs—— [10]

The Court: For example, in the counterclaim you have paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22. I think those matters probably should be stricken. And Paragraphs 23, 24, 25, 26 and 27, are merely conclusions of law. I don't know that it does any harm to leave them there. They may remain. With the exception of those that I have suggested, beginning with Paragraph 7 and Paragraph 22, the others may remain and be considered as part of the answer, as part of your presentation in this case. And also, I believe, that the motion of Lebenbaum that his answer to the second amended complaint stand as the answer to the third amended complaint——

Mr. Burrill: That that is granted, your Honor?

The Court: That is granted. Now, that defines the issues.

Mr. Burrill: May I have an exception noted?

The Court: An exception may be noted. I stated that those paragraphs that remain will remain as a part of the answer. I think I stated that. That will be the ruling. If you will take your pleadings and let us go over these paragraphs together, you will see just exactly what remains in the pleadings.

Paragraphs 1, 2 and 3 may stand. Paragraph 4 is a matter that occurred subsequent to June 1, 1946, and may be stricken. Paragraph 5 the same.

Mr. Burrill: May I interrupt, your Honor? I just noticed that you said that it was subsequent to June 1, 1946, and I merely wanted to call your Honor's attention again to the fact that you had previously referred to the date of judgment and those allegations refer to a time prior to the date of judgment.

The Court: That is included within the provisions of your answer.

Mr. Burrill: I don't so conceive it, your Honor, so that there will be no misunderstanding.

The Court: What acts do you claim under that paragraph as having occurred, that have put you in that position, under Paragraph 4?

Mr. Burrill: Paragraphs 4 and 5, if your Honor please, must be read together, of course, because Paragraph 5 is the one that refers to the execution of the agreement. Paragraph 4 is purely preliminary to Paragraph 5.

The Court: What agreement is that?

Mr. Burrill: This agreement of July 23, 1946.

The Court: In reference to that agreement, they may be stricken, paragraphs 4 and 5. Paragraph 6 has to do with a retail liquor license, which I imagine was covered by that agreement also, and is not within the issues of this case from my point of view. That may be stricken. Paragraph 7 the same ruling. Paragraph 8 may be stricken. Paragraph 9 the same ruling, and Paragraph 10 the same ruling, and 11, [12] 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22. Paragraph 23 is a conclusion of law but that may remain. I think you have asserted that in your answer. Paragraph 24 is also a conclusion of law. Paragraph 25 may remain. It is also a conclusion of law. Paragraph 26 is also to the same effect and Paragraph 27 covered by the judgment, but it doesn't do any harm. These last paragraphs don't do any particular harm. There is nothing in the nature of a cross-complaint in these paragraphs so they may be considered as a part of the answer. So you have nothing left in the way of a cross-complaint. That is the effect of it.

Mr. Burrill: May we note an exception, just for the record?

The Court: Yes.

The Clerk: Shall I mark the document "Filed"?

The Court: It may be filed.

The Court: I don't know that I want to announce any ruling except my entire ruling at the conclusion of this case. The ruling heretofore made, of course, stands unless it is reversed, or, rather,

unless some other ruling is made. You may introduce your lease and present your case from the standpoint of your theory and then, when the case is completed, I will make my ruling.

You may proceed with the introduction of your evidence. [13]

Thereupon defendants Gawzner introduced and there were received in evidence defendants Gawzner's Exhibits 1 (Lease) and 2 (Notice of Termination of Lease). It being stipulated that copies might be introduced in lieu of the originals. It was further stipulated that the original of Exhibit 2 was served upon the defendant Lebenbaum and received by him on or about August 11, 1944.

It was further stipulated that the defendants Paul Gawzner and Irene Gawzner are the owners of the property described in plaintiff's third amended complaint.

Mr. Burrill: Then, if your Honor please, at this time I would like to move the court, with your Honor's permission, that the court make an order directing payment of all of the funds on deposit in the registry of the court to the defendants Gawzner, the basis of that motion being, first, that the institution of the condemnation proceeding with which we are here involved and the giving of the notice, which is defendants Gawzners' Exhibit 2, operated as a cancellation of the lease between the defendants Gawzner and the defendant Lebenbaum and, therefore, that the defendant Lebenbaum's in-

terest in the property terminated upon the expiration of the date specified in the notice.

In that connection, I would like to call your Honor's attention to Paragraph 10 of the lease, which is defendants Gawzners' Exhibit 1 in evidence, and call your Honor's attention to the fact that, under this taking, more than 50 per [14] cent of the rentable rooms were acquired, and that the option rested upon either party, not merely upon the landlord, but either upon the landlord or the lessee, to give the notice terminating the lease. Mr. Hearn, I think, was in error on that.

Mr. Hearn: Yes; either party may give the notice but, of course, Lebenbaum didn't elect to give a notice.

Mr. Burrill: Now, if your Honor please, in connection with that, I want to dispute Mr. Hearn's position in that connection. What the California statute holds is that the value is fixed as of the date of the issuance of summons, not the party to whom the compensation shall be paid. That is ordinarily fixed as of the date of the entry of the interlocutory judgment in condemnation. I merely point that out because he asked for the second ground of my motion, to order the payment of all of the funds on deposit to the defendants Gawzner, under Paragraph 10 of the lease, regardless of the cancellation of the lease; that the award in condemnation proceedings is payable to the lessor. Those points have both been argued before your Honor before. I realize that your Honor definitely has ruled on a

pre-trial ruling as to one of those points. I do not recall whether or not now, if your Honor please, there has been a ruling on the second point, namely, that, regardless of the cancellation, the language of Paragraph 10 requires the money to be paid in a condemnation case to the lessors, who are the defendants Gawzner. And, if [26] your Honor desires to hear further argument on that, I am, of course, prepared to argue it; but I see no reason why I should reiterate arguments that have heretofore been made, unless your Honor desires them.

The Court: The motion is denied.

Mr. Burrill: An exception, please.

The Court: It may be noted.

* * *

Wednesday, March 19, 1947, 11:45 a.m.

(Same appearances.)

Mr. Burrill: If it please the court, we are now in a position where we can stipulate to the restoration item and, accordingly, I offer the following stipulation:

It is stipulated that the portion of the award made by the judgment of November 26, 1946, in the within cause, that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of \$91,296.

Do you so stipulate, Mr. Hearn?

Mr. Hearn: So stipulated.

Mr. Burrill: If your Honor would like the approval of the clients, they are both in court.

The Court: You gentlemen are authorized in their behalf to make the stipulation.

Mr. Burrill: Mr. Gawzner, do you approve this stipulation that I have just stated? [27]

The Defendant Paul Gawzner: Yes, sir.

Mr. Burrill: And do you, Mr. Lebenbaum?

The Defendant Lebenbaum: Yes, sir.

The Court: Mrs. Gawzner is a party, too.

Mr. Burrill: Yes; I am sorry. Mrs. Gawzner, do you also approve this stipulation?

The Defendant Mrs. Irene Gawzner: Yes, sir; I do.

The Court: Having arrived at this juncture, I am wondering if you can define that amount.

Mr. Burrill: Yes, your Honor; I can state to you the respective amounts upon which agreements were reached by specified items and am prepared to state here at the present time. Will your Honor permit us to sit at the table and to go over these items?

The Court: Yes; you may sit together. How long a list is this that you have?

Mr. Burrill: It is about a page and a half.

The Court: Don't you think it is better to file a written memorandum of those items?

Mr. Burrill: We can do whatever your Honor wishes. We can read them off into the record so that they will be a part of the record or, of course, go back to the office and prepare them, but I imagine we can do it about as rapidly in the record

and probably more so than to return to our office and do it that way.

The Court: Yes; you may do that and then you may supplant [28] that probably with a list that can be easily resorted to when the time comes.

Mr. Hearn: Mr. Reporter, I am going to suggest that, as each item is read off, you hesitate a moment before putting it down because we may wish to change the notation as to what is included in the item. It might make for a more correct record that way.

Mr. Burrill: If the court please, the item of \$91,296, just referred to and just stipulated to, is made up as follows—and, as I read these items off, they are agreed to, Mr. Hearn?

Mr. Hearn: Yes.

Mr. Burrill: Unless we specifically modify them?

Mr. Hearn: Unless we modify them.

| | |
|---|-------------|
| Mr. Burrill: Lawns, gardens and trees | \$ 1,650.00 |
| Roads and walks | 725.00 |
| Recreational facilities | 550.65 |
| Main building, which includes the exterior and interior but does not include carpeting or furniture or fixtures | 6,500.00 |
| Cottages and casitas, less the item of roof repairs but including the restoration of both exterior and interior, but not including carpets or furnishings | 13,000.00 |
| Garage and miscellaneous buildings, including storage shed, pump house, engineer's shop, gardener's tool house, storage building and linen building. | 364.00 |

| | |
|--|----------|
| Mechanical equipment, which is the repair of the heating system in certain cottages, casitas and the main building.... | 600.00 |
| Water heaters, to repair and replace..... | 3,000.00 |
| Refrigeration, which includes the refrigerators in the kitchen and the refrigerators in the cottages where there are refrigerators, to repair | 900.00 |
| The plumbing and water system, which includes the repair of taps, the repair of toilets, the repair of the well pump and the booster pump in the irrigation system | 2,000.00 |
| The sewer system, which is the cost of cleaning the sewers and septic tanks and connecting the grease trap | 2,500.00 |
| To repair the incinerator..... | 246.00 |
| Replace garden tools and power lawn mower | 710.00 |

Now, if your Honor please, that might be classified as the physical property. And the total of those items is \$32,745.65.

The next set of figures, if your Honor please, might be classified as personal property and they are made up of the following items:

| | |
|--|------------|
| Carpets and rugs, to replace | \$7,500.00 |
| Carpets and rugs, to be cleaned | 1,644.20 |
| Draperies and curtains, to replace | 1,495.00 |
| Draperies, to clean | 1,073.25 |

The next is the item of furniture and fixtures and consists of many items.

The Court: I am just wondering now, if this

will take a little while longer, if it shouldn't be deferred until after the noon hour?

Mr. Hearn: Yes, your Honor; it will take at least 20 minutes more.

The Court: I think we will defer this matter until 2:00 o'clock.

(Thereupon, a recess was taken until 2:00 o'clock p.m. of the same date.)

Wednesday, March 19, 1947, 2:00 P.M.

(Same appearances.)

The Court: You may proceed.

Mr. Burrill: Taking up where we left off, your Honor, the next item, under the furniture and fixtures, is andirons, that is,

| | | |
|--------------------------|----|-------|
| To replace two sets..... | \$ | 30.00 |
| To refinish 26 sets..... | | 52.00 |

| | | |
|-------------|----|-------|
| Total | \$ | 82.00 |
|-------------|----|-------|

The next item is beach furniture,

| | |
|---|------------|
| to refinish and repair..... | \$1,000.00 |
| Waste baskets, to replace..... | 100.00 |
| Benches, to refinish..... | 22.00 |
| Beds, to repair..... | 766.00 |
| To replace missing beds..... | 230.00 |
| Bed bases, to replace..... | 125.00 |
| Buffet and dining room set, to refinish.... | 75.00 |
| Venetian blinds, to replace..... | 75.00 |
| Chairs, to refinish..... | 1,619.50 |
| Chair, to upholster..... | 6,136.00 |
| Chairs, cleaning | 740.00 |
| Chairs, to replace..... | 1,170.00 |

The Court: Are those broken chairs or what?

Mr. Burrill: Broken or lost or something. They were missing, in other words.

| | |
|--|------------|
| The next item is chests, to refinish..... | \$ 48.00 |
| Chest, to replace, missing..... | 77.00 |
| Chaise lounge, to refinish and clean..... | 90.00 |
| Chiffoniers, to paint..... | 532.00 |
| Commodes, to repaint and refinish..... | 154.00 |
| Couches, to refinish and reupholster and clean | 500.00 |
| Davenport, to refinish and repair, reupholster and clean..... | 250.00 |
| Davenport, to replace, missing..... | 150.00 |
| Desks, to refinish..... | 690.00 |
| Desk, to replace, missing..... | 45.00 |
| Dressers, to refinish..... | 916.00 |
| Dresser, to replace, missing..... | 200.00 |
| Fire extinguishers, to replace..... | 45.00 |
| Fireside sets, to refinish..... | 80.00 |
| Fireside sets, to replace..... | 350.00 |
| Flag, to replace..... | 12.00 |
| Lamps, to repair and refinish and new shades | 863.50 |
| Lamps, to replace, missing..... | 155.00 |
| Love seats, to refinish and upholster..... | 385.00 |
| Mattresses, to refinish, retie, recover, steril- ize and replace missing..... | \$3,500.00 |

The Court: Have you that segregated?

Mr. Burrill: To replace would be \$350. The repairing and re-tying and re-covering would be \$3,150.

| | |
|------------------------|----------|
| Mirrors, missing | \$ 30.00 |
|------------------------|----------|

| | |
|---|-----------|
| Piano, to refinish and install new keys.... | 175.00 |
| Settees, to refinish, reupholster and clean.. | 830.00 |
| Window shades, new, that is, to replace, missing and torn ones..... | 250.00 |
| Sofas, to refinish, reupholster and clean.... | 685.00 |
| The next is bed springs, to repair, rehabili- tate, sterilize, and replace missing ones.. | 3,630.00 |
| The Court: Is that segregated? | |
| Mr. Burrill: Maybe we can do so, if your Honor please. Just a moment. The repairing would be \$3,333 and the replacement of missing springs, \$297. | |
| Night stands, to refinish..... | \$ 189.00 |
| To replace, missing..... | 60.00 |
| <hr/> | |
| Or a total of | \$ 249.00 |
| Kitchen stools and other stools, to refinish. | \$ 60.00 |
| The next is tables, to refinish..... | 1,500.00 |
| Tables, to replace, missing..... | 700.00 |
| The next is engineer's supplies, missing... | 1,000.00 |
| Glassware and crockery, to replace..... | 7,274.25 |
| Linens, to replace..... | 9,271.65 |

Those are all of the items, if your Honor please.

The Court: The total of that is \$91,296, is it?

Mr. Burrill: It should be, your Honor; yes, sir.

Mr. Hearn, I don't know whether our stipulation on the record covers it, but you agree, do you not, that the figures which I have read off are correct and are the stipulated items?

Mr. Hearn: So stipulated.

Mr. Burrill: There is one other small item that I think was overlooked yesterday, if your Honor please, in connection with our various motions and

the receipt of answers, that I thought to complete the record might be made, and that is that the record show an acknowledgment of service by myself, on behalf of the defendants Gawzner, of the answer to the third amended complaint as permitted to be filed by Mr. Hearn upon the substitution of his answer to the second amended complaint; and I assume that Mr. Hearn will acknowledge service after the filing of my answer to the third [34] amended complaint.

Mr. Hearn: Yes, your Honor; I do acknowledge it.

Mr. Burrill: In other words, just to show in the record that we are both aware of and have received copies of our various pleadings that were permitted to be filed by your Honor.

The Court: It may be noted.

Mr. Burrill: If your Honor please, the situation being as it now stands, with the figures agreed upon for the cost of restoration, it appears to me that the next main problem to be determined is the problem of fixing the rental value and that we should proceed to fix that.

The Court: Of this award, what is the situation with reference to the balance of the money? Is it the entire amount of the award less this stipulated amount of \$91,296? Is that the balance remaining of the award, or what is that situation?

Mr. Burrill: Yes; the total award, if your Honor please, was \$205,000. Is that correct, Mr. Hearn?

Mr. Hearn: The total award was \$205,000; yes.

But I will want to differ with you as to what should be the next order of procedure.

Mr. Burrill: I was only answering his Honor's question.

The Court: That includes the moneys that have been paid, does it, the \$205,000? [35]

Mr. Burrill: Yes, your Honor. The \$205,000 was the total award. Of that \$205,000, there has been a small portion drawn down for the payment of taxes at one time. I can find that amount out if your Honor wants it.

The Court: I don't think it is necessary now.

Mr. Burrill: And then there was also deducted from that amount the sum of \$1672.23 which was treated as payable to Mr. Lebenbaum. My understanding in connection with that is that it arose by virtue of Mr. Lebenbaum retaining possession for five days, I believe, of a portion of the premises after the government went in, and was some sort of an agreement between them whereby Mr. Lebenbaum was to receive certain moneys and the government was to receive certain other moneys. And, instead of having been paid in cash, it was deducted out of the award and the judgment recites that fact.

The Court: That is part of the \$205,000?

Mr. Burrill: That is part of the \$205,000.

Mr. Hearn: I believe it also includes the purchase of some supplies by Mr. Lebenbaum from the government.

Mr. Burrill: It may. I don't know what the details of that are. All I know is it was raised and

not repaid in cash, and the government insisted that the amount be deducted from the \$205,000 they put up in court as judgment to be apportioned for the use and occupation of the premises, including that portion of it that was under lease to Mr. Lebenbaum and [36] the portion of the property taken by the government that was outside of that area.

EDWARD H. ALLEN

called as a witness on behalf of the defendants Gawzner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Burrell:

I reside in Los Angeles and have resided here for 59 years. My business and occupation is that of an appraiser. I have followed that occupation for 33 years. My experience in that connection has been as follows:

I had done some appraising, that is, probate court appraising, previous to 1914. In the year 1914, I was appointed a regular probate court appraiser in Los Angeles County, and I received approximately 35 appointments per month in that work to appraise all of the assets of the estate, both real and personal property. That consisted of both large and small estates and during that time I appraised between five and six thousand estates and property located all over the State of California. I continued in that work as a regular probate court appraiser for

(Testimony of Edward H. Allen.)

fourteen years, until 1928. The original appointment was by Judge James C. Rives, who was the probate court judge in this County at that time. The appraisals at that time included all classes of real estate [37] which any person left in his estate, and consisted of farms, agricultural land, residential property, business property and industrial property, of every nature and description, scattered all over Southern California.

In addition to probate court appraisal experience I have had other appraisal experience. In 1923 or 1924, I was appointed or employed by the Board of Supervisors of this County to appraise a strip of land through the Malibu Ranch, a strip 100 feet wide and 20 miles long, north of Santa Monica to the Ventura County line; that is what we now know as Roosevelt Highway. And for seven years thereafter I was employed by and appraising properties for the Board of Supervisors, that is, for highway construction, flood control purposes, dams and property scattered throughout the County.

Following 1928 I have been doing general appraising. I was employed by the State Board of Equalization as an appraiser in this city for a period of eight years. Each two years I had to appraise between 250 and 300 parcels of property here in the City of Los Angeles. It was all types of property. It was used for checking against the Assessor's assessments to determine the relationship and value between industrial property and com-

(Testimony of Edward H. Allen.)

mercial property, residential property, and so on. In that work I appraised one of the four corners, each two years, on Spring, Broadway and Hill Streets from First Street to Tenth Street, and one property in the middle of the block. The other properties were properties scattered [38] around, real estate owned by the public utilities, that is, the gas companies, electric companies and railroad companies, to compare with the assessed values of property as compared to their valuation by the State Board of Equalization.

I have done appraising for the State Corporation Commissioner of the State of California and the State Superintendent of Banks and have done appraising for insurance companies. At the time of the street opening and widening program that we had here in the city, starting about 1929, I was employed by the City in appraising the properties and measuring the damage done to the property remaining, in the opening and widening program here in the city, of such streets as Olympic Boulevard, Pico Street, Wilshire Boulevard, Florence Avenue and Washington Street and various other streets.

In 1933 or 1934, when the property on which is now located the Union Depot in this city—there were 33 acres there—belonged to the Southern Pacific Railway Company, the Union Pacific and Santa Fe condemned a two-thirds interest in it and I was employed by those two railroads to appraise that

(Testimony of Edward H. Allen.)

property and testified in court in the case; and, after that, I was employed by the Southern Pacific, Union Pacific, and Santa Fe to appraise the property that was acquired for the approach to the depot, extending from Macy Street north to Alhambra Road. In the probate court proceedings I was appointed as one of the appraisers in the Henry [39] Huntington Estate, who died in 1927, and he had 2500 parcels of real estate, which I appraised, together with all of his personal property, that is, stocks and bonds and things of that kind. In 1934, I was employed by the Treasury Department of the government to appraise some 900 parcels of that Huntington Estate property for the government, and since that time I have appraised hundreds of parcels and thousands of acres of land for the Treasury Department of the government. That was in connection with matters where taxes were being litigated; estate taxes and things of that kind.

I have been employed by the Attorney General of the United States as an appraiser, by the District Attorney for the Southern District of California in the federal courts and I have been employed by trust companies and insurance companies and banks in appraising properties of all natures and descriptions scattered throughout Southern California. On many occasions I have been appointed by various courts, both the Superior and Federal, to act as appraiser, that is, in appraising property where

(Testimony of Edward H. Allen.)

the valuation question arose. In all these instances, or in the major instances, I was employed to find the market value and to appraise the market value of the property that was involved.

I have had experience in appraising hotel properties. I have been appraising properties for the past thirty years, you might say, throughout Southern California. Within the past two years I was appointed by Judge Robinson of the [40] Superior Court of San Francisco to appraise the assets of the Pacific States Building and Loan Association here in Southern California, and I appraised in that work fifteen, or eighteen, or twenty apartment houses and hotels within the past year. There were other properties other than hotels which I appraised. I was appointed to appraise commercial properties here in the City of Los Angeles and in San Diego, Glendale, Pasadena, Long Beach and Santa Monica; then I had ranches to appraise and industrial property and also residential property.

I have had experience in valuing leasehold interests. I was employed in connection with the valuation of the Bullock's store leasehold matter. I have been appraising leasehold interests for 25 or 30 years, especially in appraising estates where the deceased had a lease on property and probably it was an asset of his estate or maybe a liability. I have been employed in these leases here in the city of Los Angeles where there are 99-year leases or 49-year leases, where the lease provides that each

(Testimony of Edward H. Allen.)

five years or each 10 years a committee of three arbitrators be appointed to arrive at the value of it for the next five or 10 years, and in that work I have appraised properties on Broadway and Spring Streets and Hill Street here in the city, and have appraised properties scattered throughout the city with long-term leases on them. On many occasions in connection with estate appraisals I had to determine the valuation of a lease where the decedent owned [41] the real property that was encumbered by a lease to ascertain whether or not a leasehold had a market value over and above the rental being paid thereunder.

I have had experience in connection with hotels. I own a hotel located at Balboa, Newport Harbor, in Orange County. That is what we might classify as a seaside area. By that I mean, Balboa is on the ocean and on the bay too. It is on Newport Harbor and the property I own is generally classified as a resort hotel. I have owned the ground since 1922 or 1923 and I have owned the hotel since 1934. I don't have it leased. I actually operate it through a manager.

I have appraised the Alexandria Hotel in this city, the Ambassador Hotel and the Rosslyn Hotels at Fifth and Main Streets, and the Kip Hotel on Sixth Street and the Monarch Hotel at Fifth and Figueroa and many smaller hotels, that is, hotels from 50 up to 200 and 300 rooms scattered throughout Southern California. I was employed as an

(Testimony of Edward H. Allen.)

appraiser on the Norconian Hotel near Corona and appraised all of the property, the equipment, furniture, improvements and so on. I was employed by the owners of the Shangri-La Hotel in Santa Monica within the past two years. I was appointed by the court to appraise the Grand Hotel in Santa Monica. Those two latter hotels were taken over by the government. I appraised the Miramar Hotel in Santa Monica, which was also taken over by the government. I appraised the Biltmore Hotel in Montecito, which was taken over by the government. I also appraised [42] the Mar Monte Hotel in Santa Barbara, which was taken by the government. I also appraised the Barbara Hotel in Santa Barbara. I appraised the Huntington Hotel in Pasadena and, as I said, many smaller hotels throughout Southern California.

I was also employed to appraise the value of the use of the Miramar Hotel in Santa Barbara, the property that is involved here. The Biltmore Hotel in Montecito is only about three-quarters of a mile or a mile from the property in question here. And the Mar Monte Hotel is within the city limits of Santa Barbara and about two miles from the Biltmore Hotel and three miles from the property in question. In addition to valuations of real properties themselves, I have appraised leasehold interest as such and the market value of such leasehold interests.

I have examined the property involved in this

(Testimony of Edward H. Allen.)

case, which is designated the Miramar Hotel. I have known the Miramar Hotel for 25 or 30 years but I first saw it from an appraisal standpoint around the first of June 1944. I was there when the Army was taking possession of the property. I examined the property at that time and I have examined the property on several occasions since that time. I have maps of the property. I have examined the exterior and the interior of the buildings. I have studied the financial report made by Horwath & Horwath covering the occupancy of the premises involved during the period of time that Mr. Lebenbaum was in the premises prior to June 10, 1944. I have also [43] seen the report made by Horwath & Horwath during the period of time Mr. Lebenbaum has occupied the premises from June 1, 1946 to December 31, 1946. I have seen the lease that was executed between Mr. and Mrs. Gawzner, as lessors, and Mr. Lebenbaum, as lessee, being the lease introduced in evidence in this case as defendants Gawzners' Exhibit 1. I am familiar with the entire area that is involved that was taken by the government and I am familiar with the portion of that entire area that is covered by the lease.

(A map of the area involved, which had been previously marked upon a pre-trial hearing as the Court's Exhibit No. 1 was admitted in evidence and marked as defendants Gawzners' Exhibit No. 3.)

(Witness continuing.)

Referring to the map, defendants Gawzners' Ex-

(Testimony of Edward H. Allen.)

hibit No. 3, all of the property outlined with a blue pencil in all particulars on the map includes all of the Gawzners' holdings. That property on the map that is outlined with a green pencil, as for instance, up in the north or left hand corner, enclosed in green, is Gawzners' property that was not included in the hotel lease, and on the right hand side of the map also is an area, enclosed in green marking or hatching, that was not included in the hotel lease, and in the center of the map, near the bottom, is also some property, two slivers of land, which were not in the hotel lease. Referring to the first area marked in green that I pointed out in [44] the upper left hand corner of the map would be the northwest corner of the property, that is, at the area along the State Highway and Eucalyptus Lane. That area that is outlined in green is not included in the lease. Then on the upper right hand corner of the map is an area outlined in green which includes the garage property and certain other area. That is excluded from the lease. In the lower right hand corner is an area along the ocean front lying easterly of the wharf or boardwalk also outlined in green. That is excluded from the area covered by the lease. At the top portion of the map is an area outlined in red. That is originally the Gawzners' holdings to the northerly red line, but the property between the red line and the blue line was sold to the State of California for highway purposes. That property was, however, actually in use and occupied

(Testimony of Edward H. Allen.)

by Mr. Lebenbaum prior to July 10, 1944, and was used by the Government during the entire period they were in possession. The property is still used by the hotel. That has not been improved or occupied by the State Highway Commission as yet.

Q. (By Mr. Burrill): Mr. Allen, for the purpose of the next question, will you please assume, first, that the lease, of December 15, 1943, Defendants Gawzners' Exhibit No. 1, was in existence on July 10, 1944, and was then in full force and effect and that Mr. Lebenbaum was occupying the premises; second, that Mr. Lebenbaum had the right to assign or sublet the premises for a period from July 10, 1944, to [45] June 1, 1946, or that the lessors would consent to such an assignment or subletting; third, that the assignee or sublessee would either maintain the premises in their then condition during the period of occupancy or would, upon termination of the occupancy, restore the premises to the condition they were in on July 10, 1944, or pay the cost of such restoration; that the premises were to be continued to be used as a hotel and that the assignee or sublessee would pay the rent called for by the lease to the landlord and otherwise comply with the terms of the lease; that the term of such occupancy, assignment or sublease, would be from July 10, 1944 to June 1, 1946. Upon those assumptions, what, in your opinion, was the market value of the lessee's interest in that lease? In other words, what, in your opinion, would a will-

(Testimony of Edward H. Allen.)

ing purchaser have paid to a willing seller for the right to sublet or become the assignee of the premises involved for the period of July 10, 1944, to June 1, 1946?

Mr. Hearn: Please don't answer yet, Mr. Allen.

If your Honor please, I object to any answer to that question on the ground that the matter is irrelevant and immaterial to any of the issues in this case. And I would like to be heard on that, if I may, because it seems to me this question goes right to the very heart of this lawsuit.

(Argument of counsel and discussion between court and counsel omitted except the following concessions made by Mr. Hearn during the course of the argument (Tr. p. 128): [46])

“We are before your Honor to settle the question of the apportionment of this award as between these two contesting defendants, and I am treating Mr. and Mrs. Gawzner, of course, as being one defendant. It is true, without question, that Mr. Gawzner is entitled to recover the rental value of that portion of the condemned property which lies outside the boundaries of the Miramar Hotel. We don't dispute that.”)

The Court: I am going to make this observation. This is a vital issue in the case, of course——

Mr. Hearn: I so regard it, your Honor.

The Court: ——and it has been all during the

(Testimony of Edward H. Allen.)

litigation. I am just wondering if this evidence should not be permitted to go in subject to your objections, and the right to renew your objections later on, with a motion to strike the evidence, in the event of a ruling in your favor.

Mr. Hearn: Well, your Honor, that might save some time. It is true I feel that I am rather compelled to present my objections and my reasons for them at this time.

The Court: I will permit you to do that. I make this observation with the further view that, in the event this evidence is excluded upon the case going to a higher court, which apparently it appears it might go, by either side by being dissatisfied with the decision, everything will be before the appellate court on both sides and you won't have to come back for a retrial on any particular issue. I don't know whether I should consider that phase of the situation or [47] not but often cases, where there is evidence excluded, when they go up to an appellate court, are sent back for retrial. That would obviate the necessity of sending it back for retrial and the matter could be presented——

Mr. Hearn: Yes, your Honor; that probably would be a wise thing to do, to receive the evidence subject to our motion to strike.

The Court: That is what I have in mind. I am not making any ruling at this time on the merits of the motion or the objections.

(Testimony of Edward H. Allen.)

Mr. Hearn: I ask leave to be heard just a little further on the subject.

The Court: Yes; you may proceed with the balance of your argument.

(Further argument of counsel omitted.)

The Court: As I indicated before, I shall let the evidence go in subject to your objection and your renewal of the objection later on and a motion to strike.

Mr. Hearn: Yes, your Honor.

The Court: So the ruling will be reserved under those conditions.

Q. (By Mr. Burrill): Mr. Allen, do you recall the question that was put to you?

The Witness: Yes, sir. In my opinion, the lease had no bonus value or market value as of July 10, 1944, the date when the government took over. Had no market value or [48] bonus value, either one.

Mr. Burrill: Will you please state your reasons for that answer you have given?

Mr. Hearn: The same objection, your Honor, as I have made heretofore.

The Court: Yes; the same ruling.

(The witness continuing.)

My reasons for the answer given are based upon a study of the lease and based upon an investigation that has extended over the past three or four years as to the terms and conditions of hotel leases, that is, what percentage of the gross income the lessee binds himself to pay or what percentage of

(Testimony of Edward H. Allen.)

the net profit he binds himself to pay. In this particular instance, I don't know of and have never heard of a lease paying 35 per cent of the gross income for room sales plus 3 per cent as a so-called breakage fund or something of that kind. I have known of no hotel lease and have never ascertained of one with as high a percentage of rent as this lease contains. Another reason is that the improvements upon the property itself, which is approximately 12½ acres in ground—the youngest and latest structure built upon the property was approximately 35 years of age and the others as high as up to 60 years of age, and they require a great deal of repair and reconditioning and so on to take care of them. The living quarters through the property are in cottages that are scattered almost an equal distance over say eight or nine [49] acres of the property. The extra cost in labor of taking care of those cottages and maids going back and forth is greater than if it was all in one place in a hotel, and the cost of maintaining the grounds thereon was an obligation that isn't ordinarily found in a hotel lease. And the provision in the lease for restoration of the property in a condition such as it was as of the date of the signing of the lease is an obligation that someone would have to assume if they purchased the lease for the unexpired term. And, also, my opinion is based upon my experience through the years of appraising hotel properties and especially in the last three or four years the investigation of hotel leases in general and

(Testimony of Edward H. Allen.)

statements as to profits made from the operation of hotels. I might say I am a member of the American Hotel Association and the Southern California Hotel Association and I have received all of the bulletins from those associations as to hotels, hotel leases and the profits through the years. And it is my considered judgment and opinion that the lessee, Mr. Lebenbaum, would have been unable to have received any sum of money for the transfer of the lease to another party.

The Court: Let me see; you inquired about a transfer of the lease for a portion of the time, did you not?

Mr. Burrill: Yes, your Honor.

The Court: Do I understand this witness to analyze that lease on the basis of a transfer of the entire term?

Mr. Burrill: I will inquire. [50]

Q. Mr. Allen, the statement which you have given to me was in response to a question for a transfer of the lease for a portion of the term. Are the reasons that you have given to cover a portion only or the entire time?

A. A portion only. That is 22 months and 20 days. I understood that was in the question.

Q. That is correct; it was in the question.

In any one of these hotels that you have listed, was there a single one where the basic rent on the rooms was as high as 35 per cent?

A. No; I have never heard of 35 per cent of room sales. I have heard of liquor beverage sales of

(Testimony of Edward H. Allen.)

15 per cent. Food sales generally run 5 per cent, or I think they start at 2 per cent. I don't recall a lease where the food sales went any higher than $7\frac{1}{2}$ per cent, and I have seen leases where the liquor and food combined were $7\frac{1}{2}$ per cent. I have examined leases and obtained information where the rental required under a percentage lease was less than the amounts that I have just referred to but, as I have stated, I have never heard of a lease calling for 35 or 38 per cent of the gross room sales. It is not an usual requirement in a lease upon hotel premises that the lessee shall place the premises and maintain the premises in the same condition as he obtained them on the date of the execution of the lease. This is the first lease I ever heard of that had that. The ordinary lease provides to maintain it in the same condition in [51] which it was taken, except for ordinary wear and tear. I have never heard of a hotel lease that called for restoration.

Q. Do you consider that a burden upon the lessee over and above what is usually called for by hotel leases?

A. In my opinion, it is a burden that the lessee just couldn't meet, as demonstrated in this particular case and from the investigation I made of all of these hotels that I was appraising for Army occupation. Experienced hotel men were all of the opinion that the Army use and wear was just twice what it would have been if it had been civilians in the property. In other words, the damage done by

(Testimony of Edward H. Allen.)

the Army in two and a half years would have been done by civilians in say five and a half years or more. And for a lessee to obligate himself to put that property back and restore it is just prohibitive.

Q. You also mentioned the breakage fund of 3 per cent that is called for by this lease. Is that, in your opinion, an added burden upon the lessee, keeping in mind that the lease requires, as I have stated, that 3 per cent of the income from rooms and beverages shall be placed into a separate fund for restoration, up to \$3,000 per year?

A. Well, it is just additional rent, is all that amounts to. Some of the leases have a provision of say 2 per cent of the gross income of a hotel that shall be spent for advertising of that hotel or something of the kind, but this breakage [52] fund and so on—the tenant has already obligated himself to keep the buildings in repair and replace broken articles and so on. If it is in the lease also, this is just 3 per cent additional and really, instead of 35 per cent of the gross, it is 38 per cent.

Q. Are you familiar with the terms of the lease in reference to that breakage fund that that is to be used for replacements in connection with the premises?

A. Yes, sir.

Q. Are there any other reasons that you have, Mr. Allen, that you have not heretofore given us?

A. I don't recall any at the present time.

Mr. Burrill: You may cross-examine.

(Testimony of Edward H. Allen.)

Mr. Hearn: There will be no cross-examination, your Honor, but I would like to reserve the right, at the beginning of our next session, to make motions to strike certain portions of the testimony, including a motion to strike on the grounds heretofore stated in objecting to testimony as to the bonus value.

The Court: You say there is not cross-examination?

Mr. Hearn: No cross-examination.

(Thereupon evidence was taken as to the area outside of the lease.)

(Witness continuing.)

I have an opinion as to the market value of the right to use and occupy the portions of the property owned by Mr. [53] Gawzner that are sought to be condemned by the government in this case, that is, outside of the area covered by the lease for the period of time from July 10, 1944, to June 1, 1946, said market value being fixed as of July 10, 1944. In my opinion it is the sum of \$10,950 for the period of $22\frac{2}{3}$ months. In my opinion the two areas, Eucalyptus Lane and the beach, were of practically the same value per front foot. In my opinion the fair rental of the garage as of July 10, 1944, the date of taking was \$200 per month.

My figures for the garage only included what interest Mr. Gawzner had in this property. The Army occupied all of it, except for some storage

(Testimony of Edward H. Allen.)

in the lower portion. It is built on a hillside. The garage floor is level and under the rear end or south end of it there is a storage space, which is just a dirt floor with the roof unfinished. The rental value that I have given of \$200 a month is for the upper portion only and I have not included the lower portion.

The Court: Do you wish to cross-examine as to this?

Mr. Hearn: Yes; I would like to ask a few questions.

Cross-Examination

By Mr. Hearn:

I do not know of my own personal knowledge of any leases or rentings of any similar garage in that vicinity or neighborhood at about the same period of time. The closest garage that I know of in rental is away up in Montecito. That is the only garage on the highway there for nearly two miles. I took [54] into account the provision of Paragraph 8 of the lease in computing the rental valuation. I said I fixed the rental value of Mr. Gawzner's rights. I considered Mr. Gawzner's rights to be that at any time he had the right of improving the garage and using it for some other purpose; that any time he desired to do that, he had that right subject to no other obligation other than set forth there, except that he couldn't put anything in there to compete with the hotel, for instance, any food stuff or beverages. I considered the fact that Mr.

(Testimony of Edward H. Allen.)

Lebenbaum had the right to occupy the basement of the garage after Mr. Gawzner might put the upper portion to some such use. They used it for the storage of fire wood, and I considered that Mr. Gawzner could lease the upper floor or the main floor of the garage. The floor area is approximately 50x120 feet. I considered the fact that Mr. Lebenbaum had the right to use the basement for the storage of wood or for general purposes. They were storing wood and broken down furniture and stuff of that kind in it at the time. It is my recollection of the provision that that right continued after Mr. Gawzner might put the ground floor to some other use and I considered it in fixing my rental value.

The other portion of the outside property and by the term "outside property" is meant the portion of the property condemned which lay outside of the boundaries of the Miramar Hotel lease and were both vacant parcels of property, I [55] didn't break it down at a capitalization of any total value of the property. When I was appraising the property, I made an investigation of the sales and so on along the highway and along the beach and I determined in my own mind that the highway frontage was worth around \$100 to \$150 per front foot and that the beach frontage was approximately of the same value. I figured there was 220 feet of frontage on the highway and 400 feet on the ocean. I think the reasonable market value of that prop-

(Testimony of Edward H. Allen.)

erty at that time was \$100 or \$125 a front foot. There are 620 feet altogether and at \$100 a foot that would be \$62,000. There were offers made for property there and, when Mr. Gawzner sold a piece of property on Eucalyptus Lane, it would tend to establish a value of the highway frontage of \$125 to \$150 a front foot. The price paid by the State Highway Commission—of course, there was an angle in it of severance damage—the State Highway Commission paid \$32,200 for 2.65 acres. That sale was made in July 1942. That represented around 800 feet of frontage along the State highway. I got my information from Mr. Gawzner and the judgment in the case. I saw a copy of it or I saw the correspondence between the Highway Commission and so on. I did not arrive at my valuation by the award in that case. That wasn't must of a criterion, that property, taking a long strip of that type. There was some severance damage mixed up in it and it wasn't much of a criterion to arrive at value. The best evidence we had there [56] was the beach frontage, on offers that were made for it, and the opinion of real estate brokers in the area. I do not have any personal knowledge of those offers. They were reported to me by real estate brokers and people familiar with it. The information as to the offers made for the beach frontage owned by Mr. Gawzner did not come to me from Mr. Gawzner himself. That came from a real estate broker in Santa Barbara. There were two

(Testimony of Edward H. Allen.)

offers, one of \$150 a foot and another over, next to the house there, of \$200 a foot. The offers were made about 1942 or 1943, I forget just the date now. They were made during the war. The use that was contemplated by those offers was for residential purposes. There are houses down there on the ocean and one of these lots was that last cottage that has been built there on the beach. The frontage that I say is worth \$100 a foot is of varying depths but extends from the ocean back to the railroad right of way, as shown on defendants Gawzners' Exhibit No. 3.

Mr. Burrill: No redirect examination.

CHARLES G. FRISBIE

called as a witness on behalf of the defendants Gawzner, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Burrill:

I reside at 1865 Campus Road in the City of Los Angeles. I have resided in Los Angeles for the past twenty-five years. My business and occupation is that of a civil engineer and [57] appraiser. I have followed the profession of civil engineering and appraising about thirty-five years. I commenced my appraisal work in California about 1912 and have continuously followed my activity of civil engineering and appraising since that time. In 1912 and 1913 my activities principally took place in San Diego and then from 1914 up to about 1917

(Testimony of Charles G. Frisbie.)

in Imperial Valley. I have been located in Los Angeles ever since.

In the last 25 years, I have appraised for a good many organizations. I have made appraisals for the City of Los Angeles, where they were taking properties for the widening of streets, for parks, playgrounds, and all kinds of public purposes, and in that connection have had to appraise every kind of property. I have appraised many, many hotels that were being taken. I have appraised the value of the property as a whole and the value of any leaseholds that existed on them, and made many appraisals, for some time past, for Los Angeles County.

I appraised properties for the City of Los Angeles over a period of about 10 years and it involved several thousand different properties. That was primarily street widening proceedings and acquisitions for all kinds of other purposes, for park purposes and for viaducts and for playgrounds and for schools and innumerable other public purposes. Some of the major street opening proceedings in which I appraised properties were Flower Street in the downtown area, from [58] Seventh Street to out where it joins Figueroa Street; Olive Street between the same points; Figueroa Street; South Broadway, Second Street on out to where it joins Figueroa and then Figueroa Street out to where it joins Pasadena Avenue, Third Street, Eighth Street and Tenth Street, all of them several miles long. They involved hotel properties. Many hotels were

(Testimony of Charles G. Frisbie.)

scattered all through those projects. I appraised those properties to find the market value. I appraised the leasehold interest where there was a leasehold interest in those properties. During that same period of time I was making appraisals for Los Angeles County for the same purpose for many or other street openings and their acquisitions for parks and playgrounds and other public uses. I also was making appraisals for the City of Glendale and the City of Huntington Park and the City of Phoenix, Arizona, and various other cities and public bodies for a period of about 20 years. That would cover the period up to 1935. Subsequent to that time I have made appraisals for private corporations and private individuals for the same purposes. I have made appraisals for the State Corporation Commissioner in connection with bond issues or loans and appraised in that connection the Blackstone Hotel at Long Beach. I made appraisals for the State Insurance Commissioner and in that connection I appraised the Riviera Apartment and Hotel in Long Beach. That is a height-limit hotel. The Riviera is right on the edge of the ocean, that is, a part of it is up [59] on the bluff and a portion of it goes down to the beach level. The Blackstone is just back of the beach, just at the bluff line, in Long Beach. I have appraised the Ritz Hotel in Los Angeles. That is a height-limit hotel that is at Eighth and Flower. I appraised the Ambassador Hotel on Wilshire Boulevard and I appraised five or six hotels and apartments from four to eight or

(Testimony of Charles G. Frisbie.)

nine stories high along Wilshire Boulevard for tax purposes. I have appraised the Biltmore Hotel and the Mar Monte in the City of Santa Barbara. Those appraisals were made in connection with the acquisition of the use of those hotels by the United States Government. I appraised the Union Station site here in Los Angeles where the Union Station is now located. I appraised the property for the Southern Pacific Railroad that they owned that was involved in that proceeding and I have appraised a good many other properties that were in private ownership that were required for ingress to the Union Station site. I appraised the Times Building at First and Broadway, now a portion of the Civic Center. That is the old Times Building. I appraised the Klinker Building right across the street from the Times. I am now in the process of appraising two or three hotel properties on Broadway. In general that covers the experience I have had in the appraisal of properties. I have appraised many other properties but haven't enumerated them because they did not have anything to do with hotel valuations. At the present time I am engaged in the appraisal of Owens Lake for [60] the State of California. There are many appraisals of that kind that don't have anything to do with hotel values.

About two-thirds of my work for the past 25 years has been valuation work and includes all types of property. I have appraised beach frontage property; I appraised something over 600 feet of beach

(Testimony of Charles G. Frisbie.)

frontage just north of Santa Monica for Alonzo Bell, who owned the property at that time. That property was between the Roosevelt Highway and the ocean just north of Santa Monica. It would be similar in character to what we have been referring to as the beach land owned by Mr. Gawzner but not as desirable because you can't build in through that particular area between the highway and the beach. The physical characteristics were generally the same. I have appraised some frontage about ten miles to the southeast of Ventura along the coast. I have appraised frontage in Malibu in the Malibu Colony that is beach lot or beach frontage property. I have appraised scattered properties in Venice, in Santa Monica, Ocean Park, Long Beach and all of those towns.

I first became acquainted with the Miramar Hotel around 1937 and have been generally familiar with it since that time. I commenced my work in connection with this particular case the early part of 1946. I have been upon the grounds of the Miramar Hotel property. I was on the grounds in 1937. Went over the property at that time and I have been on the grounds two or three different times at intervals since then up to [61] 1946. I was on the grounds in 1946 again. I examined the area that is involved in this litigation and the buildings that are constructed thereon. I have examined the lease, defendants Gawzners' Exhibit No. 1. I have had available to me and examined the reports of Messrs.

(Testimony of Charles G. Frisbie.)

Horwath & Horwath, accountants, covering the period of time Mr. Lebenbaum was in possession of the premises from January 1, 1944 to July 10, 1944. I have also had available and examined the report of the Miramar Hotel for the period from June 1, 1946, to December 31, 1946 prepared by the same accountants. In addition to examining the records of this particular hotel I examined the lease provisions of quite a large number of other hotels. I made that examination to see how the provisions of those other leases compared with the provisions of this particular lease and I had to examine other leases and be familiar with other leases to know whether or not this particular lease would have a bonus value or have a market value. I have information as to the rental provisions of those other leases. There were about ten or twelve of them. I was familiar with a number of others which I didn't think were comparable at all. I have had to examine a good many different leases as of about this particular period. I have examined other hotels and have checked on the income of other hotels and have examined the cost accounting, the profits, the costs and the income on various other hotels. I have seen the map of the area that is involved, being [62] defendants Gawzners' Exhibit No. 3, and am familiar with the colored pencil markings on that map.

Q. (By Mr. Burrill): Mr. Frisbie, for the purpose of the next question, I wish you would assume

(Testimony of Charles G. Frisbie.)

the following facts, that the lease of December 15, 1943, defendants Gawznors' Exhibit No. 1, was in existence on July 10, 1944, and was then in full force and effect, and that the tenant was occupying the premises; that the tenant had the right to assign or sublet the premises for a period from July 10, 1944, to June 1, 1946, or that the lessors would consent to such assignment or subletting; that the assignee or sublessee would either maintain the premises in their then condition during the period of occupancy or would, upon termination of his occupancy, restore the premises to the condition they were in on July 10, 1944, or pay the cost of restoring the premises to their condition as of July 10, 1944; that the premises were to be continued to be used as a hotel and that the assignee or sublessee or occupant would pay the rent called for by the lease to the landlord and otherwise comply with the terms of the lease; that the term of such occupancy, assignment or sublease, would be from July 10, 1944, to June 1, 1946, as I have heretofore stated. Now, upon the assumption of those facts what, in your opinion, would be the market value of the lessee's interest in said lease for that period of time? In other words, what, in your opinion, would a willing purchaser have paid to a willing seller for [63] the right to sublet or become the assignee of the lease or the right to occupy the premises involved for the period of from July 10, 1944, to June 1, 1946?

(Testimony of Charles G. Frisbie.)

Mr. Hearn: Just a moment, please. To which the defendant Lebenbaum objects, if your Honor please, upon the ground that the question calls for an answer which is irrelevant and immaterial to any of the issues in this case, and for the reasons stated in the objection made to the same question, or practically the same question, asked of the witness Allen, on the same grounds, that is to say, that the question of bonus value is irrelevant.

The Court: I will make the same ruling as was made to the other question put to the other appraiser, and you have the same rights as then expressed.

Mr. Hearn: Yes, your Honor.

The Court: I will reserve the ruling on the objection. I will permit the evidence to go in subject to the right of Lebenbaum to move to strike. That is the same ruling that was made in relation to the other question.

The Witness: I am of the opinion that there is no market value on that lease and no bonus value. I mean for a lease to have value, market value, that it has to have a bonus value above the terms of the lease itself. My reasons are that in the examination of quite a number of different hotel leases I have not found one that called for as high a rental as a whole as this particular lease. The terms of every one [64] of those hotel leases were on a lower basis as a whole, figuring all of the different elements. I mean by the different elements that there are ordinarily three provisions. There is a percentage

(Testimony of Charles G. Frisbie.)

on the room sales and the percentage on the food and the percentage on the beverages and, considering all of those things, and particularly the rental based on room sales, it is the highest lease that I happen to have any knowledge of. Another thing, this particular property is the cottage type, with large grounds, and, under the terms of the lease, the tenant has to maintain the grounds. The cost of operation of property like that is greater than one that is all concentrated in one building. The lease calls for maintenance of the property, with no provision for normal wear and tear, that most leases do provide for, and that is quite an item and expense of operation. So, considering everything, the terms of this lease compared to the terms of all the different leases I happen to know of, I have come to the conclusion there was no bonus value in the lease and, therefore, no market value.

By "market value" I mean that it couldn't be sold to somebody for money on the particular date in question for the particular period in question.

I have an opinion as to the rental value of the premises taken by the government in this case that are outside the area covered by the lease. The government was taking not only the portion covered by the lease to Lebenbaum but also [65] taking the area shown on defendants Gawzners' Exhibit No. 3 bordered in green up in the northwest corner and also over at the east end of the property. They were taking the garage and all of the area outlined

(Testimony of Charles G. Frisbie.)

in green on said Exhibit No. 3. In my opinion the market value of the use and occupancy of the area owned by the defendants Gawzner that was taken by the government outside of the area covered by the lease for the period of July 10, 1944, to June 1, 1946, fixed as of July 10, 1944, was the sum of \$10,950. The area in the northwest corner of the property that is excluded from the lease has a frontage of 220 feet on the highway. It is all of the area west of a red line, which I have put on the map at this time. In my opinion that highway frontage has a value of \$100 a front foot. The beach frontage, that is excluded from the lease, is approximately 400 feet in length, and in my opinion that has a value of \$125 a front foot. That would make a total value for the two parcels at \$72,000 and I capitalized that at 5%. I then figured the garage rental at \$200 per month. I figured only the main floor of the garage, because in examining the lease I found the tenant had a right to use the basement if he needed it. I have information as to offers made for or acquisitions of those properties and I have information as to sales of other similar areas and I have taken into consideration the difference between the time of those offers and sales as compared to June 1944. [66]

Cross-Examination

By Mr. Hearn:

I think the rental value of the garage during the period from July 10, 1944, to June 1, 1946, was a

(Testimony of Charles G. Frisbie.)

little less than it would have been say in 1946. The garage in 1946 was rented for a little higher price. I have understood that they had an offer or had rented it for a higher price. I would say the present day rental value would be a little higher than in June 1944. I understand that the present rent being paid for the garage property was \$250 a month. If I assumed that it was \$200 a month that would not change my testimony because there isn't a great deal of difference. When you get up into the last half of 1944 and the year 1945 and then into the first half of 1946 there hasn't been any great change. There might be just a little bit but it would be so small that it would be negligible. The rental value as of July 10, 1944, was very little less than at the present time. I haven't seen any lease on the garage property that covered a period from October 1946 to February 1947. I asked Mr. Gawzner what the rental was on the garage and was informed it was \$250 a month. At the time I talked to him, which was two or three months ago, he said the rent he was receiving was \$250 a month. If I assumed that the garage was rented sometime during the month of October 1946 until sometime during the month of February 1947 at \$150 a month and since that date up to the present time it has been [67] rented at \$200 a month, that would not change my testimony as to the rental value of the garage, because there in the Santa Barbara area the peak was reached early in the summer of 1946 and there

(Testimony of Charles G. Frisbie.)

has been some recession in the last six months at Santa Barbara and at San Diego and in all of the coast towns. I would say that rental value was substantially higher in the early part of 1946 than in July of 1944. I am not aware of any sales of leases on hotel properties comparable to the Miramar Hotel in that general area which occurred at any time about or during the period from July 10, 1944, to June 1, 1946. My opinion that the Miramar Hotel lease had no bonus value is not based upon sales of similar leases in the area. It is based upon the terms of the lease itself compared to other leases. It is correct that I arrived at my conclusions by calculating that since the burdens under the Miramar lease are greater than other leases, with which I am familiar, therefore, the Miramar lease has no bonus value. The fact that the tenant of the Miramar Hotel property operated it at a substantial profit after carrying all of the burdens specified by the lease would not change my testimony. I have been familiar with the operation of that property prior to July 10, 1944, and also subsequent to the termination of the government's occupancy so I had knowledge of those factors at the time I came to my conclusion. I knew of the fact that the tenant during the period from December 15, 1943, to July 10, 1944, had made a substantial amount of money and [68] what was being paid to the owner on the lease during that particular time and how that would compare with the total amount

(Testimony of Charles G. Frisbie.)

of money provided here in this settlement.

Q. (By Mr Hearn): Did you take into account the lessee's earnings during that period? I mean net earnings now.

Mr. Burrill: I am going to object to the question of profit from business as immaterial because it is not an element that may be considered in condemnation proceedings.

The Court: Overruled. This is cross-examination.

(Witness continuing.)

Yes; I have seen the financial statements of the earnings of the property during that time. I was also familiar with the fact that under the lease the lessee, Mr. Lebenbaum, had expended the sum of \$20,000 for certain changes in the premises. I did not figure that item of expenditure added anything to the bonus value of the lease. I figured that the existence of the obligation to expend that money didn't add anything to the sale value of that lease. I had understood that a substantial part of the \$20,000 had been expended during that early period of the lease. I didn't consider that the \$20,000, or the portion of it that was spent, was a total loss to the lessee. The expenditure of that money on the property had enabled the tenant to occupy and operate the property and pay the rent and make some profit. There is no question but what he did make profit during [69] that period. The fact that he made a profit does not vary my opinion as to

(Testimony of Charles G. Frisbie.)

whether or not there was any bonus value because in putting a value on a lease you have to compare the terms of that lease with other properties and what you can lease other properties for. Any prospective purchaser of that lease would consider the terms of that lease and then he would compare it with the terms of other leases that he could get; but, unless he thought this was an exceptionally favorable lease, or if he could get another one without paying any bonus, just make a deal direct with an owner, he wouldn't pay a penny on this lease, the only reason being for any bonus on a lease is its very favorable terms because the terms are lower than other leases and there would be nothing by having that particular one.

I am familiar with market conditions on hotel properties. That is, the outright purchase and sale of the properties themselves and the purchase and sale of leases. I am familiar with the market conditions as they prevailed in that area during the period of the government's occupancy. Hotel properties or hotel leases were not readily available. There were not very many available properties. They were scarce. It is a fact that hotel properties reached what might be called a peak during the period from July 10, 1944, up to June 1, 1946. It is a fact that during that period of time hotel properties generally, including the Santa Barbara hotels, were at a very high point for earnings. [70]

(Testimony of Charles G. Frisbie.)

They reached a peak all up and down this coast during that period of time.

Q. (By Mr. Hearn): What, in your opinion, was the reasonable market rental value of the Miramar Hotel property, in its entirety during that period of time?

Mr. Burrill: To which we object on the ground it is incompetent, irrelevant and immaterial.

The Court: Overruled.

(The witness continuing.)

I figured it was \$161,500 for the entire period of 22 $\frac{2}{3}$ months.

The Court: I didn't quite understand your question. The market value of what?

Mr. Hearn: The rental value of the entire hotel property.

The Court: The reasonable market rental value?

Mr. Hearn: Yes, your Honor.

The Court: Is that the gross or the net?

Mr. Hearn: I will ask the witness.

Q. Will you explain your answer, Mr. Frisbie?

A. That, your Honor, is what I thought was the value of the entire property during that period of time from July 10, 1944, up to June 1, 1946, and took into consideration the total rent that might be received by an owner during that period of time and then took into consideration the period of time and then that it was to be paid at the beginning of the period. [71]

The Court: That is, you took that into con-

(Testimony of Charles G. Frisbie.)

sideration not as an operating hotel but as the value of the rental facilities there, is that correct?

A. Yes; and, of course, I took into consideration the fact that it was a very good period of time and that, leading up to that period, there had been a greater occupancy and the room rates were getting higher. I had taken all of those factors into consideration in figuring what I thought was a fair rental value of the entire property during that particular period of time.

Q. (By Mr. Hearn): That is, for a tenant who wanted to take over the rentable and useable facilities that were present, for hotel purposes?

A. Yes, sir. Well, it was figured a little bit higher because of the nature of the use to which it was going to be put.

Q. That is, it was taking into account the use to which the Army was going to put it?

A. Yes.

Mr. Hearn: I believe that is all.

The Court: There is another question I would like to ask and I may want to frame some questions of my own here some time during this proceeding. I haven't your formula as yet. And I may want to ask either this witness or Mr. Allen those questions, or some independent witness. You say that you took into consideration some financial report when you looked [72] into this matter of the operation of this hotel during the previous period of time that has been mentioned here, is that correct?

A. I didn't take it into consideration, your

(Testimony of Charles G. Frisbie.)

Honor, in arriving at my opinion as to the market value of this lease. I knew about it. Your Honor asked me if I was familiar with the fact. I had seen these financial statements of income and expense and net operation, and I did take those into consideration for a period of time, prior to June 10, 1946, in arriving at what I considered the total value of the use of that property would be for that period. But, in arriving at my opinion of the value of the lease itself, its sale value, I took into consideration only a comparison with other existing leases to see whether this lease was very favorable in its terms compared to these other leases. For a lease to have bonus value, it has got to be favorable; it has got to have lower terms than other leases that are available. And those were the things that I took into consideration in arriving at the conclusion that there was no bonus value in the lease itself.

The Court: You use that term "bonus value" the same as you use the term "market value", do you?

A. Not exactly, your Honor. For instance, where a man has a lease say on a hotel, if he is paying say all it is worth—we will imagine five hotels and say four of them are rented at certain terms and he is taking into consideration [73] what would be the fair rental on, we will say, this fifth hotel, and he compares the terms of the lease that is in existence on this fifth hotel with the other four

(Testimony of Charles G. Frisbie.)

hotels, and, if he finds that they are getting it at quite a low percentage and that the terms of this existing lease are quite low compared to the other available leases, then he would say, "That lease has a market value and I can afford to pay something above the ordinary rent." And that additional value in the lease is its bonus value and its reason for having market value.

The Court: Wouldn't a prospective purchaser take into consideration many factors in determining whether it had any such value that you describe?

A. Yes. If he gets away from the lease itself and gets to consider say the business and his own ability to operate a hotel, then he is getting into the business angle rather than the value of the lease itself.

The Court: Wouldn't he, of necessity, get into the operating end of that lease in order to determine whether it would be of any value? Wouldn't he consider that factor?

A. Well, just imagine that there is another lease available and, when he gets to the business angle—or say there are two hotels, both of equal merit and equal as far as making money is concerned. Here is one available on pretty favorable terms and here is another one that is not as favorable. You have to pay a higher rate on it. If he can get this one on pretty favorable terms, he goes and gets the one he can [74] get on the favorable terms. He is getting around to the business angle, assum-

(Testimony of Charles G. Frisbie.)

ing the two hotels are similar and that the opportunities are equal. He is going to take the one that he can get at the lower rate because all of the business opportunities are still there and he figures he won't pay as high rent.

The Court: If he would consider taking the lease on any terms, would he not consider whether or not that hotel had been operated as a hotel, its earnings, and all of those surrounding conditions, the demand for hotel rooms, the prospects of the hotel business in the future and the trend of the hotel business? Wouldn't he take all of those things into consideration?

A. Yes; he would because, if that trend was down and there was no chance to make any money, he, naturally, wouldn't want to take a lease.

The Court: He wouldn't start cold with a hotel that wasn't operating, that had no history of any kind, and consider that hotel on the same basis as a hotel that had been operating and had been making a profit?

A. No. If there were two hotels and one hotel was vacant and had no reputation and the other one was occupied and had a pretty good history back of it, he would take the one that had the history back of it in preference to the one that didn't.

The Court: Did you know in your investigations what the [75] nature of the operations of this hotel were during that period of time that it had been operated by Mr. Lebenbaum, up to the time that possession was taken by the government?

(Testimony of Charles G. Frisbie.)

A. I don't remember offhand; no. Mr. Burrill has the statement here.

The Court: Did you analyze the basis of your answer with that in view or not?

A. Well, in arriving at my conclusion that there was no bonus value in this particular lease, I had knowledge of the operation of that hotel and I also had knowledge of the operation of other hotels and how they compared, and came to the conclusion, because of the very high rate that was called for under the terms of this lease, that, in my opinion, it had no bonus value.

The Court: Do you know whether or not that hotel had been formerly operated, before the government took it over, with all available rooms rented or not?

A. It was getting quite a high occupancy in that half of 1944. It got up, as I remember offhand, to 80 some odd per cent average for that year and, by the time they got up into the summer, it was pretty well occupied, between 90 and 100 per cent by the middle of the summer. But the average for that first half of the year was somewhere around a little over 80 per cent in the winter months, until along in the early summer.

The Court: And it is your opinion, as you stated, that [76] the trend was upward during that period?

A. Yes.

The Court: And it had not reached its peak?

(Testimony of Charles G. Frisbie.)

A. No. By studying operating hotels, I would say they reached their peak along in 1946.

The Court: Did you take into consideration, in addition to the operation of this hotel and the sale of rooms, the sale of food and liquor, when you made your answer? A. Yes; I knew of those.

The Court: Were those factors, as disclosed in this report, that you were familiar with?

Mr. Hearn: I might say, your Honor, we intend to produce the report and the accounting firm that made it and explain it to your Honor.

Mr. Burrill: I might state I will object to the introduction of that on direct testimony as not proper direct examination. I don't want you or the court at this time to rest under any misapprehension, and that is why I made that statement. I appreciate the court is entitled to ask whatever questions his Honor desires to ask.

The Court: This witness presented himself as an expert witness in this particular transaction and I want to find out what factors were considered.

Mr. Burrill: I have made no objections to your Honor's questions but, if I deem the questions are subject to objection, I shall feel perfectly at liberty to make my objections, [77] and your Honor will undoubtedly rule in connection with that.

The Court: You should if you feel you are required to do so.

Mr. Burrill: Yes, your Honor.

The Court: I don't know that I quite under-

(Testimony of Charles G. Frisbie.)

stand you in your testimony. Here is a hotel, according to your own statement, that had been operated at a profit and, from the evidence brought out by Mr. Hearn, some \$20,000 had been spent in improvements during that period of time. I don't know what the statement shows but, apparently, the books were closed at the end of that period with a net profit. Assuming that you were a purchaser who knew that fact and you wanted to buy that hotel for that period of time, and assuming, as you say, there was at least 80 per cent occupancy and the trend was upward, you are still of the opinion, are you, that there was no value to that lease, either bonus value or market value, is that correct?

A. Yes.

The Court: In other words, you wouldn't have paid anything for it at all?

A. No, because, suppose there was another hotel available, or, when a man looked around, he was trying to determine whether to buy this lease or whether to lease some other place. He would examine other hotels and he would examine the kind of rentals they had on them. This opinion of mine is predicated entirely on the theory of bonus value on the lease [78] itself. It is not based on the profits that the tenant might be able to make as a business man and in the operation of the hotel. Somebody else might buy his business but the lease itself is what I am talking about, the value of that lease and its market value.

(Testimony of Charles G. Frisbie.)

The Court: The question was put to you, what would a willing purchaser pay to a willing seller, taking into consideration all of these things you have mentioned.

A. If, for instance, in the examination of another hotel, I ascertained that the profits during this particular period were quite a substantial sum, but I found that the rental value was away under that sum of money, it was because that was the business. When the government took over the property, you couldn't make them pay for the business that was on there.

The Court: That in condemnation proceedings apparently is the law but I am trying to arrive at facts here.

A. You have to arrive at the value of the use and occupancy during that period of time which, in my opinion, was substantially less than the profits that might be realized on the property as a whole by the tenant and by the landlord.

The Court: Did you have any method of comparing this lease with other leases in that general vicinity, assuming that you were a willing prospective purchaser?

A. Well, most of the hotels just around there were operated by owners. I do have a number of hotels up and down [79] the coast and do have the terms of those leases, the percentages being paid on the room sales and the percentages being paid on the beverage sales and on the food sales, and I

(Testimony of Charles G. Frisbie.)

did compare those with the terms of the Miramar Hotel and I didn't have any of them that were as high as the terms under the lease on the Miramar.

The Court: The sum and substance of your answer is that, because the terms of this lease were more burdensome on the lessee than other leases you were familiar with, that would not be a desirable lease, is that correct?

A. Yes; and would have no bonus value.

The Court: Notwithstanding the fact that it had earned a net profit in its operation?

A. Yes; that is true because—somebody might buy his business and pay something for it but the lease itself, in my opinion, had no bonus value and no market value.

The Court: Who else but a hotel man would buy that business?

A. Nobody but a hotel man but the hotel man would be buying something other than the lease itself. He would be buying a business. He buys the goodwill. But that was one of the elements, when we were figuring the total sum of money here, that we did not fix as the basis for that total sum that the government was to pay because we had been instructed that the government did not in a condemnation proceeding have to pay for the business, which is the profit you can make in [80] the operation, and that it had to be confined entirely to what is the fair rental value of that property. Then, when you get back to the lease itself, you compare

(Testimony of Charles G. Frisbie.)

that lease with other leases and then whether or not that is a very favorable lease and whether somebody is justified in paying a substantial bonus or the market value for that particular lease. Had I figured on the business angle of this property during that period of time, I would have figured a substantially higher sum of money.

The Court: You understand it is a controversy between two parties; that the government isn't in this controversy now? A. Yes.

The Court: That the government is out, having settled its part of this litigation?

Mr. Burrill: If your Honor please, may I take exception to that remark in this connection? I think it must be assumed that we are here apportioning an award in a condemnation case and that we are confined in the amount of money that is before your Honor to the amount that the government would be required to pay in the condemnation proceeding.

The Court: I won't pursue that line of inquiry. I just made that comment to the witness but I won't pursue any line of inquiry along those lines. The witness apparently seems to be familiar with the rule of law which he thinks prevails in a case of this kind. I was trying to elaborate [81] somewhat along those lines. However, it is not material as far as I am concerned at this time. You said that the prospective purchaser, from your point of view, would consider only the lease, is that correct?

A. The prospective purchaser of the lease itself.

(Testimony of Charles G. Frisbie.)

There might be a prospective purchaser that would want to buy the business, which is something else, and, as I understood the law, we were not to consider the business on this hotel; that, when we were figuring what the government should pay for that particular period, we could take those factors into consideration, but that wasn't the amount the government was to pay.

The Court: In giving your answer, are you construing the law or is it the law that was given to you by someone as a basis for your conclusions or what?

A. Yes; Mr. Burrill has told me what the law is, and I have been instructed in the past on this type of case, where properties were involved in condemnation and where there was an owner and a lessee involved, but, in trying to determine what portion of the award should go to the lessee, that I couldn't consider the profits that the lessee was making in the operation of the business; that I had to consider the rental value of that property and the terms of the lease and its desirability when compared to other leases of a similar nature.

The Court: Are you prepared to answer a question as to [82] the value if the business element were considered? Are you prepared to answer that question in addition to the lease?

A. No; I am not, your Honor. I would have to go into that particular phase more thoroughly in order to answer that.

(Testimony of Charles G. Frisbie.)

The Court: You haven't given that any particular study in connection with this?

A. I have studied it only in this way. I wanted to know whether the occupancy was going up, whether costs of operation were going up. The hotels as a whole up there were getting better rates during that period of time, and all kinds of matters of that kind, I took into consideration in attempting to arrive at what would be the fair rental during that period of time, but I didn't consider the value of the business itself.

The Court: Will you explain to me just what the significance of this figure that you quoted is, \$161,500? What does that include?

A. That is considering all of the various elements——

The Court: Will you name those and give me the information as if I had never heard of the matter before?

A. That there were a certain number of rentable rooms there, 135; that the occupancy prior to the taking had been going up; that a study of other hotels that were not taken by the government during that period indicated that they continued to go up and got to their peak in 1946; that this [83] particular lease and other leases indicated that rental was on ordinarily a percentage of the room sales and the beverage sales and the food sales and that, as income went up, ordinarily costs were going down, that is, they wouldn't be as much per dollar

(Testimony of Charles G. Frisbie.)

of income. And then, after studying all of those particular factors in connection with this particular property and the rental terms on other properties that I knew of, and studying the operation of other properties that operated, I finally came to the conclusion that the fair rental value of the entire property for that entire period was \$161,500.

The Court: That is to say, the rooms would rent at so much and these other facilities would rent at so much, and the total amount during all of this period would amount to this total figure, is that correct?

A. No; that isn't your Honor. The total figure that would be realized would be far in excess of this \$161,500.

The Court: What would this figure represent?

A. That is just what I considered to be the fair rental value during that period of time. Now, the owner or tenant or anybody else would want to make some profit, and you are getting over into the business angle. The only incentive for anybody to occupy a property is to be able to rent it on terms to enable him to make a profit over and above his rent. So this \$161,500 is what I would consider the fair rental value. [84]

The Court: To a man operating the hotel?

A. To anyone that would want to take that property over during that period of time. I figured it a little bit high because I figured the use and occupancy to which the government would put that

(Testimony of Charles G. Frisbie.)

was in excess of what it would have as a government operation.

The Court: I still don't understand——

A. I probably don't make myself very clear.

The Court: Perhaps it is my disability. I don't quite understand what you mean by stating that it is the fair rental value. Do you mean the fair rental value in the operation of the hotel as a business?

A. No—well, yes, a fair rental value. But it doesn't mean all of the profit that might be made out of that property. No one would ever pay that amount of rent for the property during that period of time. It does not include the profits that somebody might make by operating the hotel or business there, selling drinks, selling food and selling rooms. It does represent what somebody would be willing to pay in rent for the use of that property during that period of time, and the inducement they would have to pay that kind of rent would be that over and above that they would be able to make a substantial profit, which would be from the operation of their hotel business.

The Court: In other words, they would realize in excess of this amount? [85]

A. Yes; that is right.

The Court: And it may not represent this amount?

A. That is what they would be willing to pay

(Testimony of Charles G. Frisbie.)

in the way of rent for the privilege of having it for that period of time.

The Court: Wouldn't that in fact be during the course of the operation of the hotel?

A. The profit that they can realize would be from the operation of the hotel, like a man rents a store and he pays \$10,000 a year for the use of that store, but say he actually makes \$25,000 a year from the operation of a clothing business in that store. He would be willing to pay \$10,000 a year rent for the property, to have a property of that kind, on a good street, where he could make a good profit in the operation of his business. Suppose you had two stores side by side and one was going to cost him 6 per cent of his gross business and the other 5 per cent, and there were other stores in the neighborhood at 5 per cent. There wouldn't be any bonus value in his lease. So in this \$161,500, that is not the profit that could have been made on that property during that period of time, assuming an owner operated it. It is what I thought would be the fair rental value for the right to occupy that property and conduct a business on it, a hotel business, and sell food and liquor.

The Court: That is, that is the amount that you think [86] that a man should pay for the use of that property during that period of time?

A. Yes.

The Court: That is the sum and substance of your testimony?

(Testimony of Charles G. Frisbie.)

A. Yes; that is right, your Honor.

The Court: That is all.

Mr. Hearn: May I ask some questions, please?

The Court: Yes.

Q. (By Mr. Hearn): Mr. Frisbie, do you know of any comparable hotel property in or near Santa Barbara, California, which was available for lease, either by taking a new lease or by a purchase of an existing lease, that was available during the period of the government's occupancy of the Miramar Hotel? A. No; I do not.

Q. Would you say that there were none available?

A. I don't know of any that was available.

Q. You were generally conversant with the hotel market at the time?

A. Yes. I do not know of any that were available.

Q. Now, will you please explain this to me? Will you please tell me, forgetting for a moment this legal distinction and confining yourself to the ordinary business end, how it is possible in this kind of a transaction to separate the lease on a hotel from the business which is being operated [87] in the hotel?

Mr. Burrill: To which we object as incompetent, irrelevant and immaterial. There is no question of the business involved in this litigation. The only thing that the government took was the use and occupancy of the hotel, and the Supreme Court

(Testimony of Charles G. Frisbie.)

of the United States has held that the business and good will and items of that kind cannot be compensated for in a condemnation proceeding, where the taking is for temporary use, any more than they can when the fee is taken. And I cite your Honor United States v. General Motors.

The Court: This is cross-examination and I think counsel should have a wide latitude in examining an expert witness.

Mr. Burrill: I appreciate that it is cross-examination, if your Honor please.

The Court: It may or may not be material but I think wide latitude should be given to cross-examination.

Mr. Burrill: I agree with that, your Honor, that wide latitude is permissible but it doesn't grant the privilege to inquire into immaterial matters and that is the meat of my objection, that he is attempting to insert elements that are not considered in condemnation proceedings.

The Court: The objection is overruled.

Mr. Burrill: An exception, please.

Mr. Hearn: Will you please read the question, Mr. Reporter? [88]

(Question read by reporter.)

A. I think it is entirely possible to separate the two. One represents the value of the use of the property. The other represents the property itself plus a lot of other elements, the skill of the operator, his business ability and a thousand and one

(Testimony of Charles G. Frisbie.)

factors. They demand business ability and business skill to make a profit. One person can take a first-class hotel and have a lease on it and not make a profit, and another man, a very skilled operator, can take it and make a very big profit, and that hotel is the same hotel and it has the same rental value, and the amount of money made out of the operation of it as a business depends on the skill of the man that operates it.

Q. Now, Mr. Appraiser, you, of course, don't mean to say that this element or item that you call the business value is something that could be picked up and carried away from that particular hotel and transplanted to another hotel, do you?

A. No. The buildings of that particular hotel and the setting and location of that particular hotel are all elements that have their effect on the profit that is made in the operation of a business. That is absolutely true. But, when you get over to the business angle of it, you have many things other than just the property itself. An unskilled fellow can take a first-class property and lose money on it. The Biltmore Hotel here in Los Angeles lost money for a long time and Baron Long took it over and made a lot of money on it. In business, you have that personal element of managerial skill and experience and all of those factors, and that is the reason why in condemnation proceedings you can't collect for loss of business.

Q. A prospective purchaser of a lease on a hotel

(Testimony of Charles G. Frisbie.)

would take into account, necessarily, the amount of money that he could make as an operator from the business of operating that hotel under that lease, would he not?

A. That is one of the elements he would think about, yes, and his own skill compared to the existing operator. And there have been instances where people have taken over a hotel, that was showing a loss, because they thought they had sufficient skill and ability to make the things pay.

Q. In other words, in figuring what amount of money they could pay for the lease, they take into account and consider the amount of money they thought, considering their own skill, they could make from the hotel under the lease?

A. No. They would want to have a financial statement of operation of a hotel if they were thinking about taking over a lease, and they would study the records of that hotel and compare the records with what they thought they could accomplish. And there would be two elements. One is what is the fair rental value of this property and what is the business angle of it. More than one person has paid a million dollars for good will in private transactions. And they would [90] consider, first, the lease itself and they would be interested in the history of the property and its trend and all that. Then the next thing is the business. And those two are two entirely separate things.

Q. But, when it came down to buying the lease

(Testimony of Charles G. Frisbie.)

and paying good, hard money for it, they would take both into consideration, wouldn't they?

Mr. Burrill: I object to that upon the ground it takes into consideration elements that are not proper to be considered in a condemnation proceeding, and I object to it upon the ground it is incompetent, irrelevant and immaterial.

The Court: The objection is overruled. I think this is proper cross-examination. He has given the basis upon which his opinions are based and I think this is testing his knowledge on the subject.

Mr. Burrill: An exception, please.

Mr. Hearn: Will you read the question, please, Mr. Reporter?

(Question read by reporter.)

Q. (By Mr. Hearn): By "both" I mean both the rental value of the property and the business part of it.

A. Yes; they would be interested to know what is the past history and what has been accomplished on this property. Has it shown any profits? Has it had a good occupancy? Have they been able to get good rates on the rooms? Those are all factors any buyer of a lease would think about. And then the next step is, is there any bonus value in the lease and he would compare it with other hotels. A private person might say, "There is no bonus value in this lease but I might buy your business," and he might buy it. And say he didn't pay anything for it but he did consider the man had a business he wanted to buy and did buy it.

(Testimony of Charles G. Frisbie.)

Q. But he couldn't buy it separate from the lease, could he?

A. No. There would be two elements he would take into consideration. One is the right to occupy those premises and the other the right to take over the business that is there and, because it was a good business, he would pay something for it.

Q. You don't actually contend in fact, and aside from accounting, that the two are separable, do you?

Mr. Burrill: To which we object as incompetent, irrelevant and immaterial and it is attempting to bring into the case an element that is not compensable in condemnation proceedings and it is speculative and remote.

The Court: Overruled.

Mr. Burrill: An exception, please.

Q. (By Mr. Hearn): Mr. Appraiser, the point I make is that, aside from the process of calculation that may go on in the buyer's mind, as an actual fact and as an actual business operation, the lease and the business of conducting hotels cannot be separated, can they? In other words, let [92] us say this. If a man doesn't own the land or doesn't own the building and he wants to operate a hotel on the property, he has to have a lease to do it with, doesn't he? A. That is right.

Q. And in that sense I mean the two cannot be separated, isn't that true?

Mr. Burrill: We make the same objection.

The Court: The same ruling.

(Testimony of Charles G. Frisbie.)

Mr. Burrill: An exception, please.

A. Well, I think those two elements could be separated. They both would be considered; there is no question about that. Anybody getting a lease would consider the business angle of that property. But the two are separate things. One is the right to the property, which is the lease, and the other is the business angle to it, to make a profit.

Q. Then, can you possibly tell me how he could operate the property if he didn't have a lease?

Mr. Burrill: The same objection.

The Court: Overruled.

Mr. Burrill: An exception, please.

A. He couldn't.

Mr. Hearn: That is all.

Mr. Burrill: No redirect examination.

Mr. Burrill: If the court please, at this time I would like to ask counsel for a stipulation of fact to the effect [93] that the defendants Paul Gawzner and Irene Gawzner have been paid no sum of money or other compensation for the use and occupancy of the premises involved in this litigation, for the period of July 10, 1944, to June 1, 1946, either by the defendant Lebenbaum or the United States government, with one exception only, that there has been withdrawn from the funds on deposit in the registry of the court a sum of money of approximately \$1800, as my memory now serves me, which was used for the payment of one installment of taxes.

Mr. Hearn: If your Honor please, I have agreed with counsel that I will so stipulate. However, I realize that I should interpose an objection. I am willing to so stipulate with counsel on the facts but I do reserve the objection that the stipulation tendered is irrelevant and immaterial, not tending to prove or disprove any of the issues in this case for the reason that the only question with which we are here confronted is whether or not Lebenbaum's liability to pay rent remains and, secondly, for the reason that the defendants Gawzner, since service of the notice in August, 1944, have maintained that there was no lease and, hence, no rent due.

The Court: You stipulate that to be a fact except that you do not acknowledge the fact as stated in the stipulation as having a bearing on the case?

Mr. Hearn: That is right; yes, your Honor. [94]

The Court: I think that stipulation may be entered subject to your objection, and that calls for a ruling, I imagine, as to the materiality or not.

Mr. Hearn: It is perfectly agreeable to me if your Honor wishes to withhold the ruling on that.

The Court: I will withhold the ruling—

Mr. Burrill: On the same basis, that it is subject to a motion to strike?

The Court: Yes.

Mr. Hearn: I think now would be a good time for me to move to strike the testimony of the witness Allen and the witness Frisbie to the effect that the Lebenbaum lease had no bonus value, or, as I understand it, they testified no market value, as of

July 10, 1944, for a period of occupancy beginning on that date and ending on June 1, 1946, upon each and all of the grounds stated in my objection to the witness Allen's testimony to that effect; and upon the further separate grounds as to each of the witnesses, first, that neither of the witnesses based his opinion in that regard on any sales of hotel leases occurring at or near the period of time so indicated; and upon the further separate ground that neither of the witnesses in arriving at that opinion took into account as an element in determining value the business operation of the property by the defendant Lebenbaum for the period from December 15, 1943, to July 10, 1944.

The Court: I will withhold the ruling on that motion [95] until the conclusion of the case.

Mr. Burrill: That establishes my case.

The Court: I would like to have both sides develop their theory of the case and put it in evidence. I know you object to each other's theories but I would like to have that in the record and then I can make a determination in the matter on any theory that I might want to adopt or that I might want to consider. It is the duty of the court to apportion this award in some way or other. This court has equitable jurisdiction in the matter. I think the law imposes such a responsibility on the court, notwithstanding your contention, Mr. Burrill, that the law is as you have stated it to be. I shall try to make that sort of a determination, following the law as closely as I can, as I think it applies to this

case, and to do equity in the case. I think I am called upon to do that.

LLOYD S. PETTEGREW

called as a witness on behalf of the defendant Leo Lebenbaum, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hearn:

I am an accountant. I am a partner in the firm of Horwath & Horwath in charge of the West Coast. We specialize in hotel accounting throughout the United States and we were so engaged in the year 1944. The territory of which I am in charge includes the Santa Barbara area and did include it in [96] the year 1944. The Miramar Hotel in Santa Barbara is among our clients. I am familiar with the property. I am acquainted with Mr. and Mrs. Gawzner, the owners of the property, and with Mr. Lebenbaum, the lessee. Our firm did the accounting for Mr. and Mrs. Gawzner for a substantial period of time prior to the time that the lease was entered into with Mr. Lebenbaum. I am familiar with the lease between Mr. and Mrs. Gawzner and Mr. Lebenbaum. In connection with the Miramar Hotel since the lease was entered into between Mr. and Mrs. Gawzner and Mr. Lebenbaum we opened up the books, made the original opening entries to reflect the leasing of the property to Mr. Lebenbaum, we instructed Mr. Lebenbaum's bookkeeper

(Testimony of Lloyd S. Pettegrew.)

in the keeping and maintenance of the records and periodically we sent one of our field men up who audited the transactions and prepared statements. That was done under my supervision. I am familiar with the contents of and the manner in which each of those periodic reports was made up and am familiar with the contents of them. I have with me a report made by our company concerning the portion of the Miramar Hotel for the period from January 1, 1944, to July 15, 1944. The report shows on the first page a letter outlining the scope of the audit. There is an index. There is a balance sheet. There is a statement of various balance sheet items, such as accounts receivable, a list of payments and accounts receivable. There is a profit and loss statement and eleven supporting schedules showing the results of [97] each department. The schedules include the income and expenses for the various departments. The report also shows a recapitulation of the lessee's portion from a financial standpoint.

Q. (By Mr. Hearn): Will you state the amount of the net profit resulting to the lessee for the operation of the hotel during the period from January 1, 1944 to July 15, 1944?

Mr. Burrill: Just a moment, Mr. Pettegrew, before you answer the question.

Your Honor please, I am going to object to that question upon the ground that it is incompetent, irrelevant, immaterial, and not proper direct examination, and upon the further ground that it is an

(Testimony of Lloyd S. Pettegrew.)

attempt to introduce the profits resulting from the operation of a business, and is inadmissible upon that ground, for the reason that the business of the tenant was not taken by the government in the condemnation proceedings; for the further reason that profits or losses from the operation of a business are not proper elements to be taken into consideration in a condemnation proceeding, as calling for speculation and conjectural matters, which have been held numerous times to be improper, and I have authorities that I would be glad to cite to your Honor, if you wish them.

(Argument of counsel omitted.)

The Court: Is it your purpose to offer the entire report in evidence?

Mr. Hearn: Well, if your Honor please, I really am [98] indifferent on that. I was trying to direct your Honor's attention by means of this testimony to the particular part of the report in which I am interested. If your Honor wishes to study the entire report in connection with it, I would be glad to introduce it.

The Court: Have you any objection to the entire report?

Mr. Burrill: Yes, your Honor, because I do not believe that the items that refer to the profits from the operation of the business are admissible. The rental previously paid is admissible.

(Further argument of counsel omitted.)

The Court: You mean the expert cannot take

(Testimony of Lloyd S. Pettegrew.)

into consideration the amount of rental paid under that operation in determining the market value of the leasehold?

Mr. Burrill: I did not say the rental paid, if your Honor please, and that was not the question asked of the witness. The question asked of the witness was: What were the lessee's profits? That is a far different question from an inquiry as to what rent did the lessee pay the landlord during that period of time?

The Court: I think that would be a proper inquiry as to the amount of rent that was paid during that time.

Mr. Hearn: If your Honor please, I might say that evidently counsel has misunderstood me. I agree thoroughly with what counsel says about the profits from a business conducted on a piece of property, that they are not recoverable as such [99] from the condemnor as damages sustained as a result of the taking. I agree with that and all those cases hold that, and that is all they hold.

I am addressing this evidence to a totally different question. What would fix the value of a piece of income property, and the net income of that property is most certainly the first thought that would arise in the mind of a person who is about to buy it; in other words, a man who would buy a piece of income property, a hotel, flat building, office building, or whatever it is. The first question is, what is it earning now, and, also, he would con-

(Testimony of Lloyd S. Pettegrew.)

sider the future earning possibility. So that is not addressed to the question of how much does Lebenbaum recover from the government immediately, but the question is what was the value of the leasehold estate, and that, as Frisbie himself testified, who was produced by the Gawzners, the first consideration that the prospective purchaser will take into account is what is the record of the property for earnings.

Now, as I say, it is addressed solely to the question of the value of the leasehold, and the General Motors case, your Honor, please, bears me out definitely.

The Court: I rather believe this would be an element to be considered. I think that counsel are agreed that the purpose for which the hotel must be used under the lease is for hotel purposes; at least, they contemplate such. Then, furthermore, I think counsel would also agree that a sublessee in considering how much he would pay Lebenbaum for a sublease would take into account what he could do on the premises without violating the lease or the law so as to make the most money out of the operations on the premises. He would consider, for example, how much he could make from the sale of rooms, food and beverages. He would consider how much he would have left after he paid the rent reserved in the lease. In computing the rent reserved in the lease, it would seem that he would have to have some idea of what he could make from the

(Testimony of Lloyd S. Pettegrew.)

items mentioned so that he would know how much gross he would have to pay to the landlord per month, in addition to the \$1500, and in order to know that he would have to have some idea of the cost. I do not believe that a prospective sublessee is going to make any guess before he makes an investment of this kind, and that he would no doubt inform himself as to all of these matters and take them into consideration. I do not understand how an expert can place himself in that position and make a good summary here without considering all of these things that I have mentioned. Furthermore, I suppose you, gentlemen, are acquainted with Orgel on "Valuation under Eminent Domain."

Mr. Burrill: I have heard of the work. I have never read it, your Honor.

The Court: There is a statement there that the market value is equal to the excess of the rental value over the rent reserved. [101]

I think that is in line with your contention, is it not?

Mr. Burrill: Yes, your Honor, that is correct.

The Court: Now, in this work there is a case cited in this text on page 417, and it says this:

"The measure of damages is at what sum over and above the amount of rent reserved in the lease could the claimant have taken the lease into the market and sold it to a willing buyer on the date of the appropriation."

Then, since the lease before us in this case contains a provision whereby, in order to fix the rent

(Testimony of Lloyd S. Pettegrew.)

reserved, the profits must be ascertained, how can an appraiser testify as to how much over the rent reserved a buyer would pay unless he knows what the rent reserved would amount to?

Mr. Burrill: Your Honor please, if you are addressing that question to me, the rental payable under the lease has nothing to do with the profits. It is not a percentage of the profits of the business. That is what I understood your Honor to state just a moment ago in this question.

The Court: I am not stating that that element standing alone is to be considered. Mr. Hearn agrees with you that is not an element, the matter of profit, but if I were considering the purchasing of a sublease I would certainly consider the operations of the business and consider everything connected with it, and a purchaser would consider what he could make out of this, or that, or the other items. I think [102] all of those matters would be considered by him in ascertaining the value of that leasehold.

(Further argument of counsel omitted.)

The Court: I would like to see the report. I would like to see all of the operations between these two people. You gentlemen are at the opposite ends of a solution here. You are at the extreme ends. I will have to arrive at a solution which will be just and equitable, and I would like to get all the information I can. If you gentlemen want to furnish the court with the information, all right. Otherwise I will have to do the best I can.

(Testimony of Lloyd S. Pettegrew.)

Mr. Burrill: Your Honor please, I cannot concede that we should introduce in evidence matters which the courts have held are improper to be considered, and I do not feel that I should permit that evidence to be introduced without objection.

The Court: Is it your purpose to introduce this report?

Mr. Hearn: Yes, your Honor, I offer the report in evidence.

Mr. Burrill: To which we object upon the ground it is incompetent, irrelevant and immaterial, not proper direct evidence, does not tend to prove or disprove the issues in the case, to-wit, the market value of the leasehold interest. It has a tendency to establish the profits, which the courts have held to be an improper basis for evaluation of property in condemnation proceedings; and it calls for speculative [103] and conjectural testimony, to-wit, the profits made from the operation of a business, and is entirely improper evidence on direct examination.

The Court: I am going to receive this evidence and reserve my ruling and you will have leave to make your motion to strike. I will reserve my ruling as to admissibility, but I will permit the evidence to go in at this time and you may make a motion to strike later on.

Mr. Burrill: An exception, please.

The Court: It may be noted.

(Thereupon the report was admitted in evidence as defendant Lebenbaum's Exhibit A.)

(Testimony of Lloyd S. Pettegrew.)

Q. (By Mr. Hearn): Now, Mr. Pettegrew, will you please explain the item "Amortization of Leasehold Cost and Improvements?"

(It was stipulated and ordered that it would be considered; that the same objection would be made to all questions in reference to the report, Exhibit A, that were made to the introduction of the exhibit; that the court would make the same ruling and that an exception would be noted to each ruling.)

(The witness continuing.)

This is a write-up primarily for tax purposes of the sums that Mr. Lebenbaum gave Mr. Gawzner, or agreed to spend on the property, in accordance with the lease. It is not connected directly with the operation of the hotel, but it is [104] more or less a financial deal of Mr. Lebenbaum alone. It should not be considered in arriving at an estimate of the operation of the hotel as a going business property.

Mr. Hearn: That is all. You may cross-examine.

Mr. Burrill: I move to strike the report upon the same grounds upon which I made objections to the introduction of the same.

The Court: I will reserve my ruling until the conclusion of the case.

Mr. Burrill: Exception, please.

Cross-Examination

By Mr. Burrill:

It is a fact that Mr. Lebenbaum paid to Mr.

(Testimony of Lloyd S. Pettegrew.)

Gawzner during the entire period from January 1, 1944, to July 1, 1944, substantially an average of \$5,000 per month rent.

Mr. Hearn: That is all I have at this time, your Honor.

The Court: Are you going to put on any experts as to value?

Mr. Hearn: No, your Honor.

The Court: I will say this. I am not entirely satisfied with the expert testimony that has been introduced. I don't quite understand it, from the standpoint of the evidence given by these experts. They have apparently, one of them at least has attempted to construe the law, and I do not have the facts that I think I should have as a result of the giving of that testimony. You are not going to have any more [105] experts, you say. Therefore, I want to go over the record and see just in what respects, if any, the evidence is lacking, and which might be supplied.

It was stipulated as a fact, subject to the objection hereafter noted, that Mr. Lebenbaum paid the sum of \$20,000 that was provided for in Paragraph 6 of the lease and that of that amount \$19,983.05 had been spent jointly by Mr. Lebenbaum and Mr. and Mrs. Gawzner on the property in question during the period of January 1, 1944, to July 10, 1944, and that the remaining balance of \$16.95 was on deposit in a joint bank account in Santa Barbara. Mr. Burrill objected to the introduction of

(Testimony of Lloyd S. Pettegrew.)

the facts in evidence upon the ground that it was incompetent, irrelevant and immaterial and had to do with a period of time prior to the time that the government took possession of the premises and upon the further grounds that it was not proper direct testimony and had no bearing on the market value of the leasehold.

The Court: I will receive the evidence set forth in the stipulation and reserve my ruling on that point also. I doubt whether it may be considered, but I am willing to think it over.

Mr. Burrill: Exception, please.

The Court: It may be noted. [106]

At a further hearing of the cause on April 25, 1947, it was stipulated that the sum of \$91,296, being the portion of the award that had theretofore been stipulated should be allocated to restoration, repair and replacement of the property condemned, both real and personal, was the agreed amount that would restore the premises to their condition as of July 10, 1944, the date upon which the government took possession of the premises and that that sum included all items of ordinary wear and tear that occurred during the government's occupancy as well as all items of restoration for damage done during the government's possession in excess of ordinary wear and tear.

At a further hearing of the cause on June 6, 1947, there was presented to the Court a written stipulation dated June 6, 1947, entitled "Stipulation re

Payment of Portion of Award and Order for Payment of Funds on Deposit with the Registry of the Court," being Designation No. 25, covering the disposition of the portion of the award that was allocated to restoration, to wit, the sum of \$91,296. The stipulation was approved as to form and substance by the parties involved, and by their counsel, in open court. Thereupon the Court executed the order attached to and made a part of said stipulation and thereupon the Court and counsel made the following statements:

The Court: This seems to dispose of that portion of the matter. Of course, the Court is not concerned any [107] further with whether the restoration is made or not.

Mr. Burrill: That is correct.

Mr. Hearn: That is correct.

At a further hearing of the cause on August 14, 1947, the Court made the following statements:

The Court: I believe that we should give further consideration to this case in view of the present situation.

It is my idea that if this case had been tried before a jury and if the jury had fixed the price which the government would have to pay that the verdict would have been arrived at on a basis something like this:

The jury, of course, would have been told to fix the market value of the property involved, and the

market value would have been defined somewhat in this manner:

According to a definition promulgated in the case of Sacramento Southern Railroad Company v. Heilbron, 156 Cal. 408, "Market value is the highest price estimated in terms of money which the land will bring if exposed for sale in the open market, with a reasonable time allowed to find a purchaser, buying with full knowledge of all the uses and purposes to which it is adapted, and for which it is capable of being used."

The court feels that an informed buyer, negotiating for the purchase of Lebenbaum's lease, would scrutinize most carefully the terms of the lease; also, he would study at length the record of the operation of the establishment during the [108] period preceding the purchase of the lease.

He would try to arrive at an estimate of how much, if any, increase or decrease in revenue he could expect during the forthcoming period for which he, the buyer, expected to own the lease. He would consider the factors which would be most likely to cause such increase or decrease in revenue. He would then consider how much he, the buyer, or sub-lessor, in the event of a sub-lessor were considered, would be obliged to pay the lessor; how much he, the buyer, would be able to make over and above that figure and how much he, the buyer, could afford to pay the lessee for the lease.

An expert witness, in making his investigation prior to testifying, unless he could have found simi-

lar sales of similar properties, with similar leases, would no doubt have fortified himself with facts that I have mentioned.

He would have considered all the matters which he would have expected a buyer to consider; and he would have made the analyses which he would expect a buyer to make and, on cross-examination, he would have been able to give the court or jury the benefit of his figures.

However, the phase of the case that I have just discussed was not tried by a jury or by the court. Both of the litigants in this case, the lessor and the lessee, arrived at a compromise wherein they agreed with the government upon a figure which all parties stipulated represented the amount which the government should pay for the value of the occupancy of [109] the premises and for restoration. This figure at which you arrived was a compromise figure.

I believe it is true that both the lessor and the lessee have an interest in the property. What that interest was worth to each of them and what figure would have influenced them to consent to a sub-lease, had this property been sublet, or had that matter been considered the figure that would have been named for the purchase of such sub-lease would have been determined by them, I believe, in this manner:

I believe that the Gawznerns would have demanded that they receive from the new tenant the rent to which they were entitled under the lease.

There being no fixed rent, such figure would have

to be determined by a consideration of what had transpired during the operation of the property, with a consideration also of what might be expected to transpire during the period for which the property would be sub-let.

Mr. Lebenbaum in also fixing the figure for which he would sub-let the property, sub-lease the property, would take into consideration how much he had earned in this enterprise and how much he was likely to earn before naming a figure.

I am not stating that in a condemnation case the profits likely to accrue can be recovered from the condemnor, but it is my belief that such profits should be considered, both by [110] the seller and the buyer in arriving at a market value of the property involved.

Mr. Allen, one of the witnesses for the defendants Gawzner, stated he had had experience in determining the market value of a leasehold, in determining whether or not a leasehold had a market value over and above the rental being paid therefor.

Mr. Allen stated that he had studied the lease and also the Horwath & Horwath Report on the operation. Mr. Allen was asked regarding the bonus value of the lease and he replied the lease had no bonus value, giving his reasons as set forth in the transcript, which are mainly, that the percentage rental mentioned in the lease is too high and that he never heard of a similar lease where the tenant was obligated to pay the landlord such a high rent.

Mr. Charles Frisbie also testified for the defend-

ants Gawzner. Mr. Frisbie also stated that he was of the opinion that the lease had no bonus value and his reason was that in his experience he had not found a lease that called for such a high rental in that it could not be sold to anyone for money on the date in question. Mr. Frisbie stated that he had knowledge of the operations of the lessee during the six months preceding July 10, 1944.

Mr. Frisbie further detailed his bases for this opinion stating that an appraiser would compare the terms of the lease on the property involved with the terms of leases on [111] other properties which could be leased.

Mr. Frisbie further stated that unquestionably the lessee made a profit during the six months' period of operation. He also stated that hotel properties were at an all-time high on the date of the taking; that there were not many hotel properties available. He also stated that he did not consider the operations of the lessee or the profits made in arriving at his opinion. He mentioned that the hotel had an 80% occupancy and that there was an upward trend. That the peak in hotel occupancy was reached in 1946.

Mr. Frisbie stated that because the terms of that lease were more burdensome on the lessee than other leases with which he was familiar, that this lease would not have a bonus value, notwithstanding the fact that the hotel had shown a net profit on its operation.

Mr. Frisbie stated that if he had figured on the business angle of this property during that period

of time, he would have figured a substantially higher figure. Mr. Frisbie further stated that he had been instructed by counsel for the Gawzners concerning the law and that he had been in the past instructed that he could not consider the profits the lessee was making in arriving at a market value and he could not answer a question concerning value which entailed a consideration of profits.

Mr. Frisbie also stated on cross-examination that he knew of no hotel available for lease in the vicinity during [112] the period of the government's occupancy.

Mr. Pettegrew testified as an expert witness for the defendant Lebenbaum. His firm, Horwath & Horwath, had opened the books when the hotel began its operations under Mr. Lebenbaum and he brought to court a report made by his company for the period of January 1, 1944, to July 15, 1944. Both counsel agreed that the rental previously paid would be admissible in evidence. Counsel for the defendant Lebenbaum stated at the hearing on March 21, 1947, that he agreed the profits would not be recoverable from the condemnor but insisted that they be considered in arriving at a market value.

The Court has already expressed itself as not satisfied with the expert testimony introduced. This expression does not refer to expert testimony with reference to the portion belonging to defendants Gawzner and unoccupied by defendant Lebenbaum. There is no controversy about that particular area

of land, although there is some little difference in the values.

I think I should now make my meaning clear so that there cannot be any misunderstanding. Under Section 258(a) of Title 40, U.S.C.A., the court may make an equitable distribution of the funds in cases such as we have before us. As nearly as I can gather, both of the litigants here contend that the Court should award the fund in its entirety to each of them, leaving the other nothing. Both stand on that [113] basis: either all or nothing to their respective sides.

None of the witnesses were able to testify regarding similar property affected by a similar lease.

To take all of the fund and give it to either the Gawznors or to Mr. Lebenbaum would not be to distribute the fund in an equitable manner. That would not do equity in the case, according to my manner of think.

It appears from the evidence that during the six months the property was operated by Lebenbaum he was making some money and that he paid the landlord a sum considerably in excess of the minimum rent.

I believe I also stated that I am not satisfied with the testimony of the experts for the landlord in this case, that is to say, I am not satisfied that the manner in which they qualified themselves to express their opinions which they expressed.

My efforts to examine one of them to determine the basis for his opinion brought forth practically nothing, except the fact that he had been instructed

what the law was and he had proceeded as he interpreted the law to be.

I feel that certain evidence should be adduced, and it is ordinarily the type that would be adduced on cross-examination of an expert witness who had properly qualified himself before testifying.

I should like to have evidence presented by a witness who would place himself in the position of a prospective [114] buyer on July 10, 1944, one who would take the figures for the previous six-month operation and try to arrive at similar figures for the period during which the property was to be subleased, to wit, the period named in the Third Amended Complaint. I use the word "subleased" in a broad sense, considering what happened in this case. This would have to be done in order for the prospective buyer to obtain any idea how much rent he would have to pay. These figures will assist me in arriving at my decision.

I have already asked counsel to agree upon an expert, and I have been informed that you are unable to agree.

I would now suggest that each counsel present evidence to which I have referred by their respective experts of their own choosing.

Following the above statement by the Court and in response to a question by the Court both counsel agreed that Mr. Pettegrew, the witness produced by defendant Lebenbaum, had not been questioned about nor had he testified as to the market value of the lease in question.

Thereupon discussion was had in reference to

the valuation of the use and occupancy of the property owned by the defendants Gawzner and not covered by the lease to defendant Lebenbaum, and the following statements were made:

Mr. Burrill: The point I make is that we submitted evidence (and it is uncontradicted and undisputed) as to the value of the use of that outside land. If Mr. Hearn was [115] entitled to question that value at all, which your Honor has just pointed out, he had his opportunity to produce his witnesses here in court. He failed to do so and failed to present any evidence on that issue at all. The evidence is uncontradicted before your Honor that the value of the use of those premises is \$10,950.

Mr. Hearn: I was not prepared and am not now prepared to say that the evidence was false. I think the evidence was true that the value was \$10,950, but I say there is not \$10,950 there to pay it with.

The Court: But there is.

Mr. Hearn: Then, your Honor, if there is that much, then there isn't enough to pay for the rest of the property.

The Court: Those are two independent matters, I think, for the moment. But you did have your opportunity of contesting the value if you had seen fit to disagree with what the experts stated. I have no means of arriving at any other amount than from the evidence.

(Further discussion between Court and counsel omitted.)

Mr. Burrill: May I, for the purpose of the rec-

ord, at this time move that the Court order the distribution of the portion of the award to which defendants Gawzner are entitled for the area outside the land covered by the lease. I submit in connection with that motion that the testimony is undisputed that the value of that is \$10,950. [116]

Mr. Hearn: Which motion I oppose, your Honor.

The Court: The motion will be taken under submission.

Now, about the further testimony that I have suggested?

Mr. Burrill: Well, if your Honor please, if I may, with due deference to your Honor's opinion, I shall state my position in connection with that as I understand it.

As I understand your Honor, you desire each side to produce testimony as to the value of the lease, taking into consideration the profit that would have been made by the lessee during the period of the government's occupancy?

The Court: Taking into consideration the factors that I have pointed out.

Mr. Burrill: I appreciate that. But among that is the one item.

The Court: Yes.

Mr. Burrill: And, as I say, with due deference to your Honor's suggestion in that connection—I might as well be frank and say this—I do not consider that the profit that would have been made by the tenant an item that is proper for considera-

tion in a condemnation proceeding. And if I would attempt to produce testimony along the line that your Honor has requested, it would be contrary to what my belief is.

Accordingly, I am in a position where I most respectfully decline to produce such testimony.

Your Honor appreciates that it is not any criticism of [117] your Honor's ruling.

The Court: I fully understand that. I am not at all sensitive or thin-skinned about this matter. You may speak freely expressing your opinion as you feel that you should express it.

Mr. Burrill: Your Honor knows that I have taken that position throughout and submitted briefs on it as early as last January on this exact point: that profits could not be considered. I have maintained that position throughout, and I do not feel that I can recede from it, your Honor.

Mr. Hearn: I might state, your Honor, that I am laboring under no such inhibitions as are bothering Mr. Burrill at the time, and I shall produce such a witness.

The Court: It is possible that the court may appoint a disinterested expert.

I believe these factors that I have mentioned are essential in arriving at value, and I should like some testimony along those lines.

You say you propose to have an expert qualify?

Mr. Hearn: Yes, your Honor, and I now assume it will be Mr. Pettegrew.

Mr. Burrill: So there will be no mistake, I will

oppose as vigorously as I am able, your Honor, any testimony which is based upon the profits which were made or anticipated to be made. [118]

The Court: I think you have already made your position clear in that respect.

Your position, as you stated it, is that you decline to participate in the producing of a witness, an expert witness, to testify along the lines I have suggested?

Mr. Burrill: Yes, your Honor, who would incorporate in his valuation and in the opinion that he expresses a profit which would have been made from the business.

I submit that the witnesses that I did produce had examined the report and had all of the information available to them, as appeared by their testimony. But I will not, as I am presently advised, produce a witness who will fix his value dependent upon the profit to be produced from the premises.

I hope your Honor appreciates that my refusal to comply with your Honor's request is not an arbitrary one but based purely upon what I conceive to be the law. Otherwise, of course, I should be glad to comply with any request your Honor makes.

The Court: I understand your position. I am not forcing anything on you that is contrary to your conception of what the law is.

Thereupon further trial on the issues between the defendants Gawzner and Lebenbaum were had on October 22, 1947, and the following proceedings took place: [119]

Mr. Hearn: If your Honor please, I believe the

purpose of this hearing today is to present testimony, along the line suggested by your Honor, as to the value of the respective interests of the parties, the lessor and the lessee of the Miramar Hotel, and we are now prepared to present Mr. Pettegrew as a witness and present a report prepared by him, which I believe furnishes the information suggested by your Honor.

LLOYD S. PETTEGREW

a witness for the defendant Lebenbaum, being first duly sworn, testified as follows:

Direct Examination

By Mr. Hearn:

I am an accountant. I am a partner of the firm of Horwath and Horwath in charge of the West Coast. We specialize in hotel accounting and have for 32 or 33 years. I have been with the firm since 1931. I was educated through high school, college and in accounting. I have made a special study of accounting.

In a general way a hotel accountant goes into various hotels and audits the books and records and prepares a financial statement from them. It is the usual practice to break down those reports into percentages of income from the various departments. There is a uniform system of accounts that has been adopted by the American Hotel Association, which is in use by probably two-thirds of the hotels [120] in the country, which departmentalizes the various operations of the hotel, such as, rooms,

(Testimony of Lloyd S. Pettegrew.)

food, beverages and so on, and it is the practice to list the income and expense items both by amounts and percentages. That practice is followed by our firm.

I am familiar with the type of case that is involved here and I have testified in several such cases. I testified for the government for the Norconian case before the late Judge Hollzer and I testified on the Mar Monte case before Judge McCormick and I am scheduled to testify on the Santa Barbara Biltmore. We prepared an estimated statement of profit and loss for a period in which the government had tenure and the purpose of the determination was to show rental valuation of the property. The government had these properties taken over on a temporary condemnation for the Army.

At Mr. Hearn's request I prepared a statement with respect to the Miramar Hotel for use in this case. I have it before me.

The report consists of an estimated profit and loss statement for the year ending July 10, 1945. It further shows a division of income as between the landlord and tenant. Generally speaking there is an opening letter and two pages of comments. There is a profit and loss statement. There is a rooms departmental profit and loss statement; a food departmental profit and loss statement; a beverage departmental [121] profit and loss statement; a beach club departmental profit and loss statement and a rent calculation.

In arriving at my conclusions in preparing this

(Testimony of Lloyd S. Pettegrew.)

report I placed myself back on July 10, 1944, and estimated or projected forward the operation for one year. This was done on the basis of past results both in the Miramar Hotel and similar hotels in Santa Barbara and other resorts in California and by use of trends that were in vogue or were existing at that time.

The figures showing the past results at the Miramar Hotel and other hotels were available to me.

The statements contained in the comments and the figures and calculations contained in the various statements in the report are true to the best of my knowledge and belief.

Mr. Hearn: I would like to offer the report in evidence.

Mr. Burrill: To which we object on the ground that it is incompetent, irrelevant and immaterial and that it is conjectural and speculative and an attempt to prove future profits in a condemnation proceeding and that no portion of the award that has heretofore been made in the action between the government and the defendants included an item of estimated profits.

The Court: The objection is overruled. The report will be received for what it is worth. It will be admitted subject to a motion to strike in the same category as the other exhibit. [122]

(Thereupon the report was admitted in evidence marked defendant Lebenbaum's Exhibit B.)

Mr. Hearn: You may cross-examine.

(Testimony of Lloyd S. Pettegrew.)

Mr. Burrill: If your Honor please, without waiving my objection that I have made to the report, I ask for the privilege of cross-examination of Mr. Pettegrew for the purpose of establishing, if I can, that the report is conjectural and speculative, to substantiate my motion to strike, which I expect to make later.

The Court: Yes; you may cross-examine.

Cross-Examination

By Mr. Burrill:

This report, Lebenbaum's Exhibit B, shows an estimated and contemplated profit of \$84,469.93 for the fiscal year July 10, 1944, to July 10, 1945. I used certain estimated figures in making up the report. For instance, in the room sales, I used a figure of \$4.53 per room. That was the average room rate that was shown in July, 1944. I then used a percentage of occupancy of 94 per cent and multiplied the number of rooms by that expected occupancy and by the estimated figure of \$4.53.

There had been an average of 94 per cent occupancy in the Miramar Hotel prior to July 10, 1944, in summer seasons. There had not been an occupancy of 94 per cent in the year 1944 because it was the winter season. The occupancy in 1944 up to July 10 had been considerably less than 94 per cent. The [123] figure of 94 per cent occupancy was not the occupancy of hotels of this category generally. It might have been that figure. It was in the 90's I know. For the years 1944 and 1945 the

(Testimony of Lloyd S. Pettegrew.)

occupancy was in the 90's in the average hotels of this size throughout the United States. That is a higher average than had pertained to hotels generally prior to 1944. I would say that the occupancy on an average for the year 1943 was four or five points lower than 1944. I don't recall from memory whether it was considerably lower than that. I don't know what the occupancy was at the Miramar in 1943. I think I knew what the occupancy was in 1943 when I prepared the report Lebenbaum's Exhibit B. I would say that the 94 per cent occupancy figure was an average throughout the fiscal year of July 10, 1944, to July 10, 1945, that I calculated.

I used a percentage of expense of room sales of 21.9 per cent as shown on Schedule 1 of Lebenbaum's Exhibit B. The Miramar Hotel had an experience rating of expenses for room operation in the fifteen days of July, 1944, of 35.17 per cent and an expense of 32.74 per cent from January 1, 1944, to July 15, 1944. In Lebenbaum's Exhibit B I have used a corresponding figure of 21.9 per cent. In a Horwath & Horwath report for the average of fifty transient hotels that have less than five hundred rooms the similar expense item is 28.5 per cent for the year 1944. In the year 1945 it is 29.4 per cent. The figures which I have just given correspond [124] to the figure of 21.9 per cent that I used in Lebenbaum's Exhibit B.

Referring to beverage sales in Lebenbaum's Ex-

(Testimony of Lloyd S. Pettegrew.)

hibit B, I estimated the amount of such sales to be \$168,918.31; that is 83.6 per cent of the room sales. That is the ratio of beverage sales to room sales that existed in the Miramar Hotel in either the fifteen days of July, 1944, or the first six months of 1944, I don't know which. In other words, in estimating the percentage of beverage sales as compared to room sales I used the actual percentage that was shown for either the fifteen days in July, 1944, or the six and one-half months in 1944, but on the room expense item I did not use the experience record of the hotel. The percentage of 83.6 per cent of beverage sales to room sales is exceedingly high. The average for the same fifty transient hotels throughout the country was 45.5 per cent in 1944 and 44 per cent in 1945.

When I testified in connection with the Mar Monte Hotel I used a percentage of beverage sales to room sales of 22.7 per cent. That was the average of that hotel for the year ending June 30, 1944. I used that same percentage in the prospectus that I made of the Mar Monte Hotel.

I will explain why the ratio 21.9 per cent of expenses to room sales was lower in Lebenbaum's Exhibit B and the other figures that were put in evidence. There are two reasons, because we are comparing it with two different things. It is true that the expenses at the Miramar Hotel [125] were 38 per cent for the fifteen days in July and for the 6½-month period. That is abnormally high and

(Testimony of Lloyd S. Pettegrew.)

there is a very good reason for it. The reason was that the lessee took over and found a minimum of supply and cleaning items in the place. Perhaps he overstaffed the department for a while because he had part of the maids and housemen doing other duties. He knew it was high but only for this particular period. A further reason was that this was the winter period when sales dropped down but you still must have sufficient help to keep the rooms serviced. During the winter season of the year this room expense would normally be somewhere in the thirties. Over the period of a year it would drop due to the fact that the summer sales are heavy and the percentage drops. To compare it with the fifty transient hotels, there is not a hotel of the resort type of the Miramar included among these hotels. These are transient hotels located in cities, hotels like the Hayward, Alexandria, that we know of, where room rates are considerably lower than the \$4.53 average and where the relation between the room rate and the service is not the same as existed in this hotel.

I considered the OPA situation. These were the room rack rates, which would have been the rates if the hotel had been subject to OPA and they are the rates which were fixed by the OPA after the hotel was turned back on June 1, 1946. I think the rates were the same both before and after the [126] government had the property. I got the items that go to make up this 21.9 per cent by taking the

(Testimony of Lloyd S. Pettegrew.)

items that appeared on the books, the various items, salaries, employees' meals and so on, and adjusted those to a normal operation. The operation for the 6½ months up to the time the government took it was not a normal operation. A new lessee came in and cleaned house. His expenses during that time in every department were abnormally high. This was occasioned by the fact that he was endeavoring to operate on a different basis than his predecessor. I took hotels in Santa Barbara and similar hotels and made a study and analysis, placing them in the Miramar position and what would have been the normal operation for one year from that date. The figures are compiled in Lebenbaum's Exhibit B taking into account information from the Miramar Hotel and other hotels in that area and the Pacific Coast.

In reference to the beverage sales, our study of the Mar Monte Hotel disclosed the relation between the beverage sales and the room sales was 22 per cent, but in the Miramar was 83.6 per cent. Those were the ratios that existed in those hotels and each one of those hotels was an entirely different unit in connection with the bar. Experience shows that in each hotel there is a definite relationship between the room business and the bar business. Some hotels purposely try to build up their bar business to attract outside patronage. Other hotels do not. It also depends upon [127] their location and popularity of their bar, but in each of these cases this was the actual going rela-

(Testimony of Lloyd S. Pettegrew.)
tionship between beverage sales and room sales and there is every presumption that this relationship or ratio would continue. In other words, as the room sales went up I increased the beverage sales in the same proportion as they existed prior to that time. I did this even though I found that in the two hotels which are approximately 2½ miles apart, they varied from 22 per cent in the Mar Monte to 83.6 per cent in the Miramar during that same period of time. That is due to the fact that the Miramar had a big volume of soldier drop-in trade. I increased those beverage sales in Lebenbaum's Exhibit B not on any estimation as to what the additional liquor sales would be but purely upon the percentage of the room sales regardless of whether there would be any more drop-in business, or less drop-in business. There was a definite ratio existing and the most scientific approach isn't to say, "Well, there are going to be 400 soldiers drop in the bar next week and each one of them will spend so much," but a study as shown that there are trends and there are relationships between the various departments, and it is also true that as the room sales go up the food sales and beverage sales also go up and they go up in approximately the same proportion. That is what I did in this instance regardless of the fact that in this hotel there was an exceptionally high beverage sale in comparison to the room sales. [128]

As the room sales went up I used the same percentage of beverage sales to determine what in my

(Testimony of Lloyd S. Pettegrew.)

opinion would be the sale of beverages in the hotel.

I used a percentage of the same room sales in computing the various expense items. In other words, my whole basis started with a calculation that the room sales would be 94 per cent times \$4.53 times the number of rooms. I didn't calculate the expenses on the room sales. The report shows that the administrative and general expenses were 12.2 per cent. The actual ratio at the Miramar in July, 1944, was 18.65 per cent and for the year 1944 it was 14.94 per cent. I am referring to defendant Lebenbaum's Exhibit A. In Lebenbaum's Exhibit B the administrative and general ratio is 12.2 per cent as opposed to actual experience at the Miramar in July, 1944, of 18.65 per cent and for the six months of 1944 it was 14.94 per cent and the reason for it is the same as I told you in the room expenses; that this was a new operation at that time and it hadn't gotten down to normal.

I might add that there were also some expenses incidental to closing the place, sales of inventory and many things of that nature in connection with losing possession to the Army. I am not talking about liquor, I am talking about these expense items. I say they are higher than normal in percentage due to that fact. It is true that he made money on the liquor but we haven't considered that in making up [129] this Lebenbaum's Exhibit B.

In Lebenbaum's Exhibit B I used a repairs and maintenance ratio of 10.1 per cent. The Miramar

(Testimony of Lloyd S. Pettegrew.)

had shown in July, 1944, 34.59 per cent and for the six months of 1944, 22.16 per cent. The national averages show 10.2 per cent for the fifty transient hotels for the year 1944 and 11.1 per cent in 1945. My computation in Lebenbaum's Exhibit B varies by 1/10th of one per cent from the average hotel. This should be lower than the national averages because under this lease the landlord was to take care of repairs to the building and roofs, so the tenant's repair expense would be less than normal.

The actual percentages at the Miramar of 34.5 per cent and 22.5 per cent are ridiculous. It is due to the fact that he had a great many men working and a great amount of material expended to put the place in order when he took it over. The total unapportioned expenses at the Miramar was 62.49 per cent for the first fifteen days of 1944 and the average for the first 6½ months of 1944 at the Miramar was 48.11 per cent and the average for the fifty transient hotels in 1944 was 44 per cent and in 1945 it was 45 per cent. In Lebenbaum's Exhibit B I used 31 per cent in comparison to those figures. I think I have explained the reason for the differences.

In Lebenbaum's Exhibit B I showed an estimated profit of \$84,469.93 for the fiscal year. During the period of actual [130] operations at the Miramar from January 1, 1944, to June 30, 1944, in the first report we prepared we showed a profit of \$7,957.06. In a revised report it shows a profit of \$8,482. The principal revision was by reason of the

(Testimony of Lloyd S. Pettegrew.)

fact that all of the liquor was sold when the Army came in. We made another report in October, 1944, for the period from January 1, 1944, to July 15, 1944, and showed a profit of only \$5,170.67. On July 31, 1944, we made a report on the Miramar Hotel of the operations from January 1, 1944, to June 30, 1944. That report showed that Mr. Lebenbaum had made a profit of \$7,957.06. That is not Lebenbaum's Exhibit A. On October 6, 1944, we made another report for the Miramar Hotel for the period from January 1, 1944, to July 15, 1944, and showed a profit of \$5,170.67. On December 6, 1944, we made another report from January 1, 1944, to July 15, 1944, in which we showed a profit of \$8,482.67. That is Lebenbaum's Exhibit A but it is not the same operation because the figures are different. It was the same hotel. When the Army took over the Miramar Hotel Mr. Lebenbaum had a lot of things on his hands; he had liquor; he had cleaning supplies, soap and a thousand and one things; they are broken packages. It so happened that subsequent to the preparation of the first report Mr. Lebenbaum decided to write-off a lot of advertising matter that he had, a lot of loss he had incurred in guest's soap and things like that. Subsequent to that second report he went out and sold some items, principally [131] liquor, at a profit and some of those items that had been written off, he got some cash for, so that raised the result to \$8,400.

(Testimony of Lloyd S. Pettegrew.)

Q. (By Mr. Burrill): In the period of the six months from June 1, 1946, to December 31, 1946, Mr. Lebenbaum was operating the hotel and made a profit of \$2,001.38, did he not?

Mr. Hearn: That is objected to as irrelevant and immaterial being for a period of time subsequent to that which is covered by the period here under inquiry and a totally different operation resulting from the fact that at that time Mr. Lebenbaum had to take over a damaged hotel, hardly fit for operation, and which hadn't been open to the public for a period of two years. I don't think the situation is at all comparable.

The Court: It is cross-examination. The objection is overruled. It is admitted only for the purpose of cross-examination, testing the ability, whatever term you want to use, of this witness insofar as he is concerned but not for the purpose of influencing any figures that are pertinent in this case.

The Witness (Continuing): That is correct, Mr. Burrill.

Q. (By Mr. Burrill): Do you know what percentage of occupancy there was during that period of time I have just mentioned?

Mr. Hearn: That is objected to as irrelevant and immaterial. [132]

(Argument of counsel omitted.)

The Court: I don't know that that would establish anything in relation to the projections which the

(Testimony of Lloyd S. Pettegrew.)

witness made when he prepared this Exhibit B. As I understand it, that was merely a hypothesis, wasn't it?

The Witness: That is right.

The Court: But you may proceed. I am interested.

Mr. Hearn: May I be heard, if your Honor please?

The Court: Yes.

Mr. Hearn: As I understand the purpose of Mr. Pettegrew's report Exhibit B, it is that he would be required to put himself in the position of a prospective purchaser of a running hotel, to be operated for a future period, not a hotel which had been taken over and pretty near destroyed by the Army. And it seems to me that, when Mr. Lebenbaum goes back into possession and takes the burden of trying to operate this hotel which the Army had just vacated, he is not in the position that would have been represented by a prospective purchaser standing at the threshold of July 10, 1944, and looking forward to the possible profit he might have made.

The Court: I think that is correct but I don't understand that you used this witness for that purpose, as to what a well-informed buyer might anticipate in arriving at the value.

Mr. Hearn: Yes, your Honor; that is what the evidence [133] is offered for, just for that purpose, and, certainly, that man, intending to operate and bidding on and attempting to purchase a hotel which

(Testimony of Lloyd S. Pettegrew.)

he was going to operate, and which the government was never going to go near, wouldn't take into account the damaged condition which would result in 1946.

The Court: Then, I understand the witness is testifying as to a figure which might be used as a profit that a well-informed buyer might anticipate he could make out of the hotel during this operation, under lease, for a period of one or two years from the taking?

Mr. Hearn: Yes, your Honor. That is what I understood was your Honor's suggestion.

The Court: It was but I didn't quite read your report in that light. I thought you were trying to work out something else.

Mr. Hearn: We have, certainly, a well-informed hotel man here and he puts himself in that position to show the anticipated profit for the future period, and that is offered in evidence here on the assumption that the prospective, well-informed buyer on that first date would have taken those anticipated profits into account.

Mr. Burrill: May I be heard, if your Honor please? I don't so understand that the witness was offered as an expert to express an opinion as to the value of this lease or anything of the kind because he, certainly, hasn't laid any foundation for that purpose. [134]

The Court: I tried to direct your thoughts along those lines but, when this exhibit came to me, I

(Testimony of Lloyd S. Pettegrew.)

must have misread it or didn't understand that that was your purpose.

Mr. Hearn: It most certainly is. I am sorry if I misled your Honor in my communication to you.

The Court: You were attempting to effect a division of the moneys available, based on the profits which might have been anticipated?

Mr. Hearn: Yes; that is true, your Honor.

The Court: I believe that is the same thing I had in mind.

Mr. Hearn: That is true, your Honor. We are endeavoring by this testimony to show what the prospective interest of both the lessor and the lessee would have been and that is why that ratio is inserted in this report. As I understand it, your Honor has in contemplation a division of this money, which is now in the registry, between the lessor and the lessee, based upon the value of the leasehold, of both the reversion and the leasehold, as it would have been on July 10, 1944, taking into account the prospective profits of both of these men, and this report Exhibit B is offered for precisely that purpose.

Mr. Burrill: Then, if your Honor please, I renew my objection and I move to strike the report because it is an obvious attempt to recover out of a condemnation proceeding by anticipating the profits that might have been made and they [135] are not recoverable in a condemnation proceeding, and I submit there are cases——

Mr. Hearn: It is not an attempt, if your Honor

(Testimony of Lloyd S. Pettegrew.)

please, to recover profits as such at all. It is an attempt to recover value, taking into account prospective profits, for the purpose of determining value. We are not trying to recover profits, certainly.

The Court: You are trying to apportion this money according to the formula worked out by this exhibit?

Mr. Hearn: That is right.

The Court: But I want information as to the factors which might be considered in arriving at a value.

Mr. Hearn: If your Honor please, if I might have the liberty of turning to your Honor's statement on the matter——

The Court: What a well-informed buyer would look into and anticipate.

Mr. Hearn: And that is what I intend to offer by this Exhibit B. Possibly I have bungled it but that is what I intend by it, just exactly that and nothing else.

The Court: That is to say, that your figures have a tendency to show what a well-informed buyer might anticipate he could make out of the hotel during this operation?

Mr. Hearn: That is correct and, at the same time, to establish what the ratio would be between the lessor and the lessee, for the purpose of determining a division of this money here. That is what the intent is. [136]

The Court: Suppose we ask the witness. What

(Testimony of Lloyd S. Pettegrew.)

is your theory of that report? Tell us in your own words and in plain language.

A. I made up a report of the estimated profits for one year, taking into consideration rent, which is an expense, and which is also that which accrues to the lessor.

The Court: What did you have in view when you made that estimate?

A. I didn't know what your Honor wanted. I was asked to make up this statement. It can be used for two or three purposes. It, certainly, would be the basis for a buyer to base his offer of purchase price on, standing at that time, to know what the anticipated earnings were, and then he would simply calculate in his own mind the number of times the earnings he would offer for this lease. At the same time, to arrive at this figure, we have to calculate the rent and take it in as an expense because, regardless of whom the lessee was, he would have to pay the rent. So, by simply taking the net profit available to the lessee and the rent which he has previously determined, you get a ratio. I don't know what the purpose of making this report up was. I was engaged to do it. Mr. Hearn could probably tell you that.

Mr. Hearn: I just told his Honor what my purpose was.

The Court: That is what I have been driving at, what a buyer might anticipate and consider in making a purchase.

A. There is the figure, your Honor. [137]

(Testimony of Lloyd S. Pettegrew.)

Mr. Burrill: I am going to object to the witness stating anything about that because, if your Honor please, there has been no foundation laid to qualify this witness as an expert upon the market value of leaseholds. He is qualified as an accountant and I haven't questioned that but I certainly misunderstood the report and, if it is what Mr. Hearn says it is—he says it isn't an attempt to recover profits, but I can't read the English language if it is not an attempt to recover it and squarely so because it purports to divide the award into percentages between what this theoretical lessee would have made and what the rent would have been to the landlord under this same theory, and it is a direct percentage between those two.

Mr. Hearn: May I read from the transcript, if your Honor please, of August 14, 1947, page 11, line 11? This is your Honor's statement: "I should like to have evidence presented by a witness who would place himself in the position of a prospective buyer on July 10, 1944, one who would take the figures for the previous six-month operation and try to arrive at similar figures for the period during which the property was to be sub-leased, to wit, the period named in the amended complaint. I use the word "sub-leased" in a broad sense, considering what happened in this case. This would have to be done in order for the prospective buyer to obtain any idea how much rent he would have to pay. These figures will assist me in arriving at my decision." [138]

(Testimony of Lloyd S. Pettegrew.)

The Court: That is the question I asked and that is the information I wanted. If that report was made for that purpose, well and good.

Mr. Hearn: Your Honor went on further to say, in line 24, "I would now suggest that each counsel present evidence to which I have referred by their respective experts of their own choosing and that this be done in this manner: We can arrange for a date when the respective experts may testify and be subject to the questions of their counsel and opposing counsel and of the court."

That is most certainly what I had in mind, and it would be probably impossible to find a better expert witness than this man, to stand at the threshold of this taking by the government and arrive at the prospective profits and prospective rent that the prospective buyer would take into consideration.

The Court: Is there anything further, Mr. Burrill?

Mr. Burrill: No, your Honor. I have had my say.

The Court: Go ahead.

Q. (By Mr. Burrill): I have forgotten where I was but I think I had completed, Mr. Pettegrew, that the profits, for the period of seven months from June 1, 1946, to December 31, 1946, at the Miramar Hotel, were \$2,001.38, is that correct?

A. That is correct.

Mr. Hearn: To which I renew my objection, if your Honor please. I think it is entirely irrelevant

(Testimony of Lloyd S. Pettegrew.)

to the question [139] propounded by your Honor and, certainly, beyond the period covered by the government's occupancy and not a comparable operation or not an operation that is relevant to the type of leasehold interest that the prospective buyer, standing at July 10, 1944, would have wanted to buy.

The Court: I am inclined to believe that is correct, although it may have something to do with the competency of the witness to make these calculations, only for the purpose of cross-examination. I won't consider it for any purpose except to determine the witness' qualifications in giving his testimony.

Mr. Burrill: If your Honor please, I have two purposes in mind in asking the question. The first one is to show that the actual operations by the tenant on this property are nothing like this hypothetical \$84,000 that the witness has testified to. That is a matter of testing his knowledge and credibility as an expert accountant, estimating what that profit would be; and, secondly, I have in mind the purpose of showing that this report that he has gotten out is purely speculative and conjectural and an estimation of future profits, because I propose to make a motion to strike that when my cross-examination is complete.

The Court: The witness states it is speculative, do you not?

The Witness: It must be. [140]

Mr. Burrill: Then, if the witness concedes it is

(Testimony of Lloyd S. Pettegrew.)

speculative, I again renew my motion to strike and my objection to it. It can't be founded on fact.

The Witness: Maybe you know a different definition of "speculative" than I do.

Mr. Burrill: I agree perfectly with you, Mr. Pettegrew, and that is the basis of my objection, because I think it is absolutely improper in a condemnation proceeding, if your Honor please.

The Court: That objection will be overruled.

(The witness continuing.)

From January 1, 1947 to June 30, 1947, the profits of Mr. Lebenbaum in the operation of the hotel were \$3,116.65. That is a total of slightly more than \$5,000 for a year and a month. There is no item in that figure for Mr. Lebenbaum's personal services. He has another manager up there. That includes Lebenbaum's compensation for whatever his own personal services are worth. I know that Mr. Lebenbaum is at the hotel most of the time. I don't know what he does. I know he doesn't manage the hotel. He has hired a manager for the hotel. I assume he puts in his personal efforts up there and the profit shown in the reports is in part at least compensation for whatever service he renders and the same thing is true as to the profit he made in the operation of the hotel in the early part of the year 1944.

I do not know what the percentage of occupancy was during [141] this last period of time, namely, from June 1, 1946 to July 1, 1947. I don't know

(Testimony of Lloyd S. Pettegrew.)

that the hotel was between 90 and 95 per cent occupied during the fall of 1946. I have heard but I do not know of my own accord that Mr. Lebenbaum was charging rates in excess of the average rates that are shown in Lebenbaum's Exhibit B during this period of time subsequent to June 1, 1946.

Q. (By Mr. Burrill): Do you know what occupancy was in the spring of 1947?

Mr. Hearn: That is objected to as irrelevant and immaterial and beyond the scope of the period here in question and beyond the purview of any contemplation of a prospective buyer standing as of July 10, 1944, which I am attempting to prove by this report.

The Court: The question may be asked for the purpose of showing discrepancies, if any, in the method used by this witness. It is merely for the purpose of testing his credibility.

The Witness: I don't believe I can answer the question, Mr. Burrill, because I don't believe Mr. Lebenbaum keeps any occupancy statistics. I don't know that there weren't any vacancies during the fall of 1946. I have talked to Mr. Lebenbaum occasionally and he would say that business was pretty good. I did not ask him what his occupancy was. I did not ascertain what his occupancy was for the first six months of 1947 and I haven't the slightest idea what it was [142] for the period from June 1, 1946, to December 31, 1946. In Lebenbaum's Exhibit B it was my opinion that the occupancy would

(Testimony of Lloyd S. Pettegrew.)

have been an average of 94 per cent right up to the first of June 1946.

In Exhibit B I took into consideration the sales of beverages would continue throughout the period of the government's occupancy. I knew that the government did not take over the liquor license at the Miramar Hotel from the defendants.

Mr. Hearn: If your Honor please, may the answer be stricken for the purpose of an objection.

The Court: Yes.

Mr. Hearn: That is objected to as irrelevant and immaterial. Again going back to the position of the prospective buyer on July 10, 1944, it would not contemplate any taking over by the government or any liquor license or anything else.

(Argument of counsel and comments of the Court omitted.)

The Court: The answer may be reinstated.

The Witness: Yes, I knew it. In Lebenbaum's Exhibit B I used a computation of supposed sale of beverages on the Miramar premises during the period of time the government was in occupancy but I didn't consider that the government was operating this hotel. I considered that a hotel man would be operating it and if a hotel man operated it, he certainly would have a bar there. In other words, in arriving at the [143] profit that is shown in Lebenbaum's Exhibit B, I took into account assumed sales of beverages on the Miramar Hotel premises during the period of July 10, 1944 to

(Testimony of Lloyd S. Pettegrew.)

July 10, 1945 and for the period of July 10, 1945 to June 1, 1946.

The Court: Food, also?

The Witness: Yes.

The Court: And all this is projected on the experience of those six and a half months, is that correct? It is all based on that theory?

The Witness: Yes, sir; and it is adjusted to what normal operations would be because the tenant took it over and had it for a period of six and a half months, during which his expenses were away out of line compared with normal expectancy. In Lebenbaum's Exhibit B on the assumed operation the rental that would be paid to the landlord for the use of the premises would be \$91,648.02 and for the $22\frac{2}{3}$ months that the government was in occupancy the rental would have been \$173,112.80. The rental in the lease and the rental used in the computations in Lebenbaum's Exhibit B is based upon the gross business.

It is correct that a prospective purchaser of the lease whether he would have made a penny or whether he would have made a \$100,000, he would have had to pay the landlord \$91,648.02 on the amount of business that I assumed would have been done during that period. If he hadn't done that much business, he would have paid less rental. The rental [144] that I assumed is again based upon the assumed sale of services at the hotel. It is correct that if those services had been sold that amount of room sales and that amount of liquor and that

(Testimony of Lloyd S. Pettegrew.)

amount of food, he would have to pay the rental whether he had made any profit or not. It is also true that one operator may take over a hotel and make a profit and another one may lose money in the operation, but under this lease he is obligated to pay the rental whether he makes a profit or not.

Mr. Burrill: If your Honor please, I again move to strike Lebenbaum's Exhibit B from evidence upon the ground that the witness himself has admitted that it is speculative. I believe the cross-examination has established that it is; that it is an attempt to show profits; that it is conjectural; and that it is improper evidence in a condemnation proceeding or in any attempt to apportion the award that has been rendered in a condemnation proceeding.

The Court: That is in line with similar motions. My previous ruling was to take it under submission as I remember. It will be the same ruling.

Mr. Hearn: I oppose the motion on the same grounds that I have heretofore stated. In line with your Honor's suggestion, the report is offered for the purpose of establishing value both as to the landlord's interest and the lessee's interest, taking into account prospective profits that an informed purchaser would have considered, who was a prospective [145] purchaser at the time that the government took over, he taking into consideration that he was going to operate the hotel, in the place of the lessee Lebenbaum, as a private enterprise.

The Court: And your theory is that that would

(Testimony of Lloyd S. Pettegrew.)

be the result that a well-informed buyer might anticipate in considering the purchase of that lease or sublease?

Mr. Hearn: Yes, your Honor.

Redirect Examination

By Mr. Hearn:

Q. Is it your opinion that the same rate of operation would continue from the period of July 10, 1945 to June 1, 1946.

Mr. Burrill: The same objection, if your Honor please.

The Court: The same ruling.

The Witness: It is.

The Court: Whatever hypothesis you built up in this Exhibit B was based on——

A. It was based on that and adjusted to normal conditions and the results of similar hotels.

The Court: During the first six and a half months, what was the ratio of Lebenbaum's profit to the rental that was paid?

A. I don't know, your Honor; I do not have the figures.

The Court: It was about three and a half times, was it not? Look at the exhibit there. Was it $3\frac{1}{2}$ to 1?

A. About that. [146]

The Court: When you made your compilations or computations in Exhibit B, you placed yourself in the position of a prospective buyer of the lease, did you?

(Testimony of Lloyd S. Pettegrew.)

A. I think so; yes.

The Court: As of July 10, 1944?

A. I stood right at that date, projected forward.

The Court: What does Exhibit A show the occupancy of the hotel to be on July 10, 1944?

A. It doesn't show it, your Honor.

The Court: Do you know what it was at that time?

A. No; I don't. Occupancy figures which are of a specific nature have not been kept in this hotel as long as I can remember, which goes back to 1940 or 1941. Nobody kept them.

The Court: What factors did you take into consideration that would lead you to believe that there would be an increase? You increased the occupancy from 84 per cent to 92 or 3 per cent, whatever it was.

A. I used 94 per cent, your Honor. I didn't increase the occupancy because we didn't know what the occupancy at the Miramar was nor what some other hotels of a comparable nature were. And, as a matter of fact, during this year under review, we have found out, and this is in connection with the Mar Monte case—we found that the occupancy was considerably higher than 94 per cent for approximately the same period, and we used the 94 per cent in the Mar Monte case and it was accepted. [147]

Mr. Burrill: Just a moment. I am going to object to the witness stating what was accepted in some other case.

(Testimony of Lloyd S. Pettegrew.)

The Court: You may state what figure you used.

A. We used 94 per cent in the Mar Monte case, which, as Mr. Burrill said, was only 2½ miles away from the Miramar, and that was on a conservative basis. So, in line with the same procedure, we established the Miramar occupancy at 94 per cent for this period. Undoubtedly, if it had been open and operated by Mr. Lebenbaum during those war years, I am confident that the occupancy would have been very close to 100 per cent because there was a definite shortage of rooms all up and down the Coast and in Santa Barbara in particular.

The Court: How did you arrive at that figure in Exhibit A of the occupancy of 84 per cent, or was that the figure?

A. I don't know of any 84 per cent figure, your Honor. There is nothing in here about the occupancy. It would be under "Rooms" in Schedule B if there was any occupancy. I have no knowledge of an 84 per cent occupancy at any time. There are no occupancy figures in here.

The Court: I found that figure somewhere but I don't recollect just where it was.

A. I don't think it was mentioned today.

The Court: It might be reflected in the gross room sales. Would that appear there? There was an increase in the gross room sales? [148]

A. Here we have a 15-day period and here we have six and a half months and we projected Ex-

(Testimony of Lloyd S. Pettegrew.)

hibit B on a period of a year, but there has never been any occupancy calculated at this hotel to the best of my knowledge and that goes back to the landlord's operations.

The Court: I notice in your Exhibit B you used about a 70 per cent increase in the gross room sales over what they showed in Exhibit A, is that correct?

A. I don't know. There would be an increase.

The Court: Will you look at it and see if that is approximately correct, and about 33 $\frac{1}{3}$ per cent increase in beverages and about the same increase in food sales?

A. That would run in proportion.

The Court: I would like to have you explain the reason for this increase.

A. The reason for the increase, your Honor, is that this period from January 1 to July 15, as presented in Exhibit A, represents what you might term two adverse factors. The first was the taking over of the hotel by a new man, in this case Mr. Lebenbaum, who had to build up both the volume of business and the physical appearance of the place, and, secondly, this is the slack season, the off season, in a resort, January 1 to July 15. Your real business starts on the 1st of July.

The Court: And this is your explanation?

A. Yes, sir. [149]

The Court: In Exhibit A, the actual profit of operation—that is about 6 per cent, is it not?

A. 6 per cent of what?

(Testimony of Lloyd S. Pettegrew.)

The Court: Will you look at Exhibit A?

A. Yes; approximately that.

The Court: And in Exhibit B——

A. It is 20 per cent.

Q. Will you explain the difference and the reason for the difference?

A. The same reason prevails all through these statements. Mr. Burrill has submitted statements, two or three of them, and each one doesn't correctly portray the normal operations. In one case Mr. Lebenbaum has just started in. He has to put the property in shape and he is working in the winter season. Now, when you go, as Mr. Burrill did, to 1946, when Mr. Lebenbaum again took the property over, it was terribly run down. He didn't have a guest in the house. He opened there one day. He is standing there with an empty hotel. It is obvious that you can't fill a hotel up in a day or week or even a month when it has been closed all this time. And, in addition to that, you have a tremendous amount of what we call pre-opening expenses that are of a non-recurring nature and that are only incurred in properties the first six months of getting a new operation started. So that each one of these six-month statements which were made up does not reflect a condition or is not applicable to a man, standing on [150] the threshold of July 10, 1944, as a prospective buyer. He is not buying a property subject to those conditions. And for that reason this statement would differ materially from

(Testimony of Lloyd S. Pettegrew.)

either of these. In other words, Exhibit B is what Mr. Lebenbaum or some other operator would normally expect after he had gone through this period. There is one more factor, your Honor, in comparing these statements. This statement is a net profit after depreciation. This figure is available before depreciation.

The Court: Which figure?

A. This \$84,000. There has been no depreciation deducted from that. That would account for part of the difference.

The Court: That is, the lessee would have received \$84,000 during that period or would have earned it?

A. That is correct.

The Court: And the landlord would have earned approximately \$103,000?

A. No; he would have earned \$91,000. The depreciation as it is used today is merely an allowance for income tax purposes.

The Court: Is that \$84,000 for a year's operation or two years?

A. That is for one year.

The Court: So, assuming it would be \$84,000 for one year—and the landlord's, you say, is how much? [151]

A. \$91,000.

The Court: Yet, the actual earnings during the six months' period were the ratio of \$8,000 to approximately \$30,000 or thereabouts?

(Testimony of Lloyd S. Pettegrew.)

A. It is really \$10,000, your Honor, because it is the profit before depreciation.

The Court: The report shows that he drew out \$9600 and, yet, his earnings were only in the neighborhood of \$8,000 or a little less.

A. His cash earnings were \$10,884.

The Court: And the landlord received during that period of time approximately how much?

A. \$30,000. If the tenant hadn't been forced to make these heavy expenditures—for instance, Mr. Burrill brought out these repairs were something like 47 per cent of his sales—if he hadn't made those of his own free will, then his \$10,000 would have been pretty close to the \$30,000, but he chose to put his money into the place to improve it and, in doing that, reduced his net profit. These were expenses all of an unusual and non-recurring nature.

The Court: He would have continued to have had expenses, of course?

A. But not in that volume. The average hotel expends 10 or 11 per cent of its room sales on repairs and maintenance throughout the country, California, New York, Florida, anywhere you go. During this six months' period the lessee [152] voluntarily spent 22.16 per cent.

The Court: And during this projected period, how much did he spend?

A. I think it was 10.1 per cent, which is the normal expectancy.

The Court: I believe you gave the reason, what

(Testimony of Lloyd S. Pettegrew.)

factors led you to believe that there would be an increase in the hotel occupation.

A. Yes, sir.

The Court: I think you have stated it, or haven't you?

A. That is quite correct.

The Court: That is, you base it on the experience of these other hotels, is that correct?

A. Right.

The Court: Is there any further examination?

Mr. Hearn: I would like to ask Mr. Pettegrew a question.

Redirect Examination
(Resumed)

Q. (By Mr. Hearn): Mr. Pettegrew, were you personally familiar with the physical condition of the Miramar Hotel when Mr. Lebenbaum took it over on December 15, 1943? A. Yes, sir.

Q. And can you state generally to the court what its condition was?

A. It was not in good physical shape. It was quite necessary to expend a considerable amount of money to get it in [153] reasonably good shape and that is what Mr. Lebenbaum did.

Q. And would you say that, by the time the Army took over on July 10, 1944, Mr. Lebenbaum had put it in good shape?

A. Yes; I would say he had.

Q. In condition for a normal operation?

A. That is correct.

(Testimony of Lloyd S. Pettegrew.)

Q. And a prospective buyer of the lease, at July 10, 1945, would have the benefit of those expenditures of his? A. That is correct.

Q. And would have been able to carry on a normal operation promptly from that date on?

A. He should have been.

The Court: Considering this ratio of $3\frac{1}{2}$ to 1 we have talked about as the income of the landlord over the income of the tenant, during the period of operation, doesn't it occur to you——

A. It is less than 3 to 1, your Honor. It is 30,900 against 10,884.

The Court: You took the lower figure, apparently.

A. That is out of line, your Honor, and the reason it is out of line is that the tenant's expenditures were so much greater than the ordinary expenditures that it distorted the ratio in this particular case.

The Court: So, when you project 52 per cent for the landlord and 47 per cent for the tenant, it seems rather——

A. That is close to 50-50 and it is almost 3 to 1.

The Court: I would say that is rather a steep increase.

A. It is quite a difference. This is what would normally happen and this is what happened in this short period of six and a half months: If the tenant had not put all his money into fixing the place up and getting it going, then the ratio would have

(Testimony of Lloyd S. Pettegrew.)

been much nearer this one. In other words, this \$10,000 profit would have been increased to perhaps 25 and you would have had somewhat near this figure.

The Court: Of course, you had to take into consideration——

A. I am not saying he is not going to make any repairs at all. If he had accepted this place in first-class physical shape, then this ratio would probably have prevailed rather than this one.

The Court: When you say "this one" you mean Exhibit B would prevail?

A. That is right; but, due to the fact that he had to spend all of this money, his results were distorted for the first six months' period. And the same thing is true if you go on to 1946 because he, again, had to take the thing and it was in worse shape than the first time he took it over. The Army had moved out. So you can't make any true comparison by using a period of distortion.

The Court: However, you are taking into consideration a factor that is not reflected on the books, aren't you?

A. No, sir. [155]

The Court: You say, when he takes it, he has considerably more repairs that he won't have to do again and things of that kind?

A. That is a physical condition that a buyer purchasing the property would know of physically.

(Testimony of Lloyd S. Pettegrew.)

Further Recross-Examination

By Mr. Burrill:

I wouldn't say that the repairs and maintenance at the Miramar Hotel have always been high in comparison because it is an old property. I know that in 1941 the repairs and maintenance exceeded 17 per cent of the gross room sales because Mr. Gawzner had just taken over the property. In 1942 it was 13.7 per cent. In 1943 it was 20.14 per cent. There was an unusual factor in that year. I think Mr. Gawzner built some more cabanas and charged them to expense instead of capitalizing them. In 1944 the percentage was 22 per cent. Mr. Lebenbaum claimed that in the period of time that he took over after the government went out that he charged to repairs and maintenance the unusual expenses that had to do with the damage done by the government. I know that he set up an account and claimed in court that he didn't do so and asked for a refund out of the restoration account for those extraordinary items but he said afterwards there was a lot more than he had claimed. It is a fact that he claimed that he had expended over \$22,000 for restoration and he also claimed there were repairs that he should have gotten in. I don't [156] know what the basis of his claim was but the report for the six months ending June 30, 1947, shows an expenditure of 10.1 per cent of room sales for repairs and for the three months after that 9.8 per cent. So apparently in the 1947 period he is

(Testimony of Lloyd S. Pettegrew.)

running at normal on his repairs and maintenance. I never checked the list he submitted as to what were repairs and maintenance and what was restoration cost in connection with this case. I don't know whether those items he claimed were restoration items were actually repair and maintenance items. The statement I made awhile ago was based upon what Mr. Lebenbaum told me. I have never examined the list which he submitted to the defendants Gawzner and which he claimed were restoration items.

It is correct that in Lebenbaum's Exhibit A I said the profit is \$10,000 plus. There is no entry on the books of a salary for Mr. Lebenbaum. The \$10,000 represents what he earns for his services, his investment, or whatever you want to call it, but it includes his personal services. In other words, no salary was taken out for Mr. Lebenbaum's personal services before I arrived at the \$10,000 profit. I charged against that profit of \$10,000 an amortization of leasehold costs and that is where I arrived at the \$8,000 figure. No, he would not have to take it out of his profit each quarter or each year as he went along or take it out of his profit at the end of the time. He paid \$20,000 to rehabilitate the place. He put a deposit up. He would not necessarily have to [157] deduct the \$20,000 from the profit that he makes from the hotel during the period of time he is in the premises. He doesn't have to make these improvements. Ordinarily, the

(Testimony of Lloyd S. Pettegrew.)

landlord makes them but in this particular lease he was to make them and the only reason it was set up on this basis was so that it didn't become a problem taxwise to the landlord. It is no problem to the tenant.

Further Examination

By the Court:

Lebenbaum's Exhibit A was prepared from the Miramar Hotel books. We sent an auditor up who audited the books and then prepared the statement. Leo Lebenbaum kept the books. We audited them. We inspected the payroll returns and the sales tax returns. This is an audited statement and it so states in the opening letter. We accepted the books as presented to us by Mr. Lebenbaum after we had checked them. We checked all of the entries, traced them back into the checkbook and all of those things. That is the basis of the preparation of our audit.

The Court: I think counsel are aware of the fact that the court is trying to divide the remainder of this money that is available in an equitable manner, as nearly as possible according to what each would have received had the hotel been operated during those years under the lease. That is my ultimate aim. I know that is contrary to your theory, Mr. Burrill.

Mr. Burrill: Yes, your Honor. I concede that it is. [158]

The Court: How does that appeal to you, Mr. Hearn?

(Testimony of Lloyd S. Pettegrew.)

Mr. Hearn: If your Honor please, I will be frank to say that, if we could arrive at such a conclusion in this case and if, by that means, we could further arrive at a final judgment, and I mean a non-appealable judgment, then that would be quite satisfactory to me, but, if it does not so result, then I will reserve all rights of appeal on the theory that I have heretofore previously expressed.

(Certain arguments and statements between Court and counsel in reference to obtaining an independent witness omitted.)

Mr. Hearn: I believe, in view of Mr. Burrill's objections to the testimony of Mr. Pettegrew, I had better, for the time being, decline to enter into such a stipulation because, after all, I am very much afraid of an appeal by the defendants Gawzner from any judgment arrived at, based on testimony such as that which Mr. Pettegrew has given. And I, frankly, would have my serious doubts of the validity of such a judgment. And, if I am correct in so stating, then the expense of such an expert would be a loss. I do, however, state that, if we can arrive at a judgment based upon testimony such as Mr. Pettegrew has given, and if, by stipulation, that can result in a non-appealable judgment, and if such a judgment is, in my opinion, an equitable one and which at least fairly closely approximates that which Mr. Pettegrew's report suggests, then I will be willing to stipulate to the non-appealability of [159] the judgment.

(Testimony of Lloyd S. Pettegrew.)

The Court: In considering the question of the outside area not covered by the lease, I think I am bound to consider only the testimony that we have before us. You offered no evidence on that score, did you? You used the same experts, didn't you?

Mr. Hearn: No, your Honor; I not only didn't offer any evidence on it but I will state that I think the evidence offered by Mr. Burrill's witnesses was probably correct. The only thing I say is that in this proceeding the award made for the outside lands shouldn't be made in full when the award made for the land included in the lease is not made in full.

(Certain statements between Court and counsel omitted.)

The Court: Then, you have no further evidence to offer in that respect?

Mr. Hearn: No, your Honor; I don't believe I could produce a witness who would testify the rental value of the outside lands was any less than has already been testified to.

Mr. Burrill: If that is the case, if your Honor please, may we renew our motion to have an order from the court authorizing the withdrawal of \$10,950, being the value testified to by Mr. Frisbie as to the land outside of the lease?

The Court: I don't think I will make any partial order. I will consider this entire matter.

I want this hearing continued. I will formulate something that I will advise you gentlemen about.

Further proceedings in the matter were had January 23, 1948, as follows:

It was agreed between counsel that the statement submitted by Mr. Burrill of the questions that had been reserved for decision by the Court were correct.

The Court: I believe at a hearing we had formerly I asked you gentlemen if you would be willing that another appraiser be selected by the court, one who was not connected with either side, and you were both of the opinion that wasn't necessary and it wouldn't avail us anything. I considered that for a while and finally decided to just take the matter on the record that has been established and consider all of the evidence in now that is going to be submitted. Is that your idea?

Mr. Burrill: Your Honor's statement is correct according to my understanding. Certainly, we declined, on behalf of the defendants Gawzner, to employ an additional witness or to have the court employ one. And I understand that Mr. Hearn had made the same statement.

Mr. Hearn: Yes; I so understand it, your Honor; that the matter is ready for submission.

The Court: So, then, we will consider the matter submitted at this time.

[Endorsed]: Filed Aug. 2, 1949. [161]

No. 12299

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, etc., *et al.*,

Defendants.

PAUL GAWZNER and IRENE GAWZNER,

Appellants and Cross Appellees,

vs.

LEO LEBENBAUM,

Cross Appellant and Appellec.

Opening Brief on Behalf of Appellant and Cross
Appellee Paul Gawzner and Irene Gawzner.

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TOPICAL INDEX

| | PAGE |
|---|------|
| Jurisdiction | 1 |
| Concise abstract of case and questions involved..... | 3 |
| Specification of errors..... | 8 |
| Summary of the argument..... | 13 |
| Argument | 16 |
| The District Court erred in holding that the condemnation clause did not effect a cancellation of the lease and require payment of the award to Gawzners..... | 16 |
| The judgment of the court distributing the award was erroneous | 26 |
| The bonus value is the proper measure of the lessee's interest in the award..... | 36 |
| The court erred in admitting evidence of loss of profits..... | 40 |
| The court misinterpreted the stipulation for restoration..... | 45 |
| The court erred in refusing Gawzners permission to file paragraphs IV, V, XX and XXI of their cross-complaint and Exhibit B attached thereto..... | 48 |
| Conclusion | 48 |

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|---|------------|
| Galvin v. Southern Hotel Corporation, 164 F. 2d 791..... | 38, 39, 48 |
| John Hancock Mutual Life Insurance Company v. United States, 155 F. 2d 977..... | 37 |
| Joslin Manufacturing Co. v. Providence, 262 U. S. 668, 67 L. Ed. 1167, 43 S. Ct. 684..... | 41 |
| Mitchell v. United States, 267 U. S. 341, 69 L. Ed. 644, 45 S. Ct. 293..... | 41 |
| Straszula Bros. Co. v. Fargo Real Estate Trust, 152 F. 2d 61.... | 22 |
| United States v. Cooper Corporation, 312 U. S. 600, 85 L. Ed. 1071 | 25 |
| United States v. General Motors, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R. 390..... | 41 |
| United States v. Improved Premises, etc., 54 Fed. Supp. 469.... | 19 |
| United States v. Land, 57 Fed. Supp. 548..... | 20 |
| United States v. Petty Motors Company, 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729..... | 18, 36, 42 |
| United States v. 10,620 Square Feet, etc., 62 Fed. Supp. 115.... | 23 |
| United States v. 21,815 Square Feet of Land, etc., 59 Fed. Supp. 219 | 21, 23 |
| United States v. 26,699 Acres of Land, etc., 174 F. 2d 367.... | 31, 43 |
| United States v. 45,000 Square Feet of Land, etc., 62 Fed. Supp. 121 | 24 |
| Van Brocklin v. Anderson, 117 U. S. 151, 29 L. Ed. 845..... | 25 |

STATUTES

| | |
|--|---|
| Act of August 18, 1890 (26 Stat. 316)..... | 2 |
| Act of July 2, 1917 (40 Stat. 241)..... | 2 |
| Act of April 11, 1948 (40 Stat. 518)..... | 2 |

| | PAGE |
|---|------|
| Judicial Code, Sec. 24(1) (28 U. S. C. A., Sec. 41(1))..... | 1 |
| Second War Powers Act (Act of March 27, 1942; Public Law 507, 77th Cong.)..... | 2 |
| United States Code Annotated, Title 40, Sec. 257 (now Secs. 1358 and 1403, New Judicial Code)..... | 1 |

TEXTBOOKS

| | |
|--|----|
| 18 American Jurisprudence, Sec. 259, p. 899..... | 40 |
| 18 American Jurisprudence, Sec. 232..... | 18 |
| 54 American Jurisprudence, Sec. 2, p. 521..... | 24 |
| Annotated Cases 1918B, p. 878, 879..... | 40 |

No. 12299

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Appellants and Cross Appellees,

vs.

LEO LEBENBAUM,

Cross Appellant and Appellee.

**Opening Brief on Behalf of Appellant and Cross
Appellee Paul Gawzner and Irene Gawzner.**

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1291 of the *New* Judicial Code. The original suit is an action in eminent domain brought by the United States of America against the appellants and cross appellees Paul Gawzner and Irene Gawzner and appellee and cross appellant Leo Lebenbaum of which the District Court had jurisdiction under Section 24(1) of the Judicial Code as amended (28 U. S. C. A. Section 41(1)) and under 10 U. S. C. A. Section 257 (now Sections 1358 and 1403 of *New* Judicial Code).

The Third Amended Complaint in Condemnation, upon which the original suit went to trial, was filed October 23, 1946, under the authority and pursuant to the provisions of an Act of Congress approved August 18, 1890 (26 Stat. 316) as amended, by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; U. S. C. Paragraph 117) and the Act commonly known as the Second War Powers Act, being Act of Congress approved March 27, 1942 (Public Law 507—77th Congress [R. 36 to 44].*

Judgment and Decree in Condemnation fixing the amount of just compensation to be paid by the United States was entered November 26, 1946, the Court retaining jurisdiction to determine the distribution of said award between Gawzners and Lebenbaum, who were the only interested parties in said award [R. 53 to 59]. Funds in payment of said judgment were deposited by plaintiff in the Registry of the Court [R. 264-265]. The issues between these parties were framed by the answer to the Third Amended Complaint of plaintiff and Cross-Complaint against Lebenbaum filed by Gawzners [R. 72-86] and Answer of Lebenbaum to the Second Amended Complaint [R. 87-98], which by stipulation and order of the Court was to stand as the Answer to the Third Amended Complaint [R. 263].

*Throughout this brief defendants below and appellants and cross-appellees in this Court Paul Gawzner and Irene Gawzner will be referred to as "Gawzners" and defendant below and appellee and cross-appellant in this Court Leo Lebenbaum will be referred to as "Lebenbaum." Wherever necessary to refer to plaintiff it will be referred to as "United States."

Reference to the Transcript of Record will be made by referring to said Record by the letter "R," followed by the number of the page referred to.

All emphasis ours unless otherwise noted.

Final judgment of the District Court upon Distribution of the Award Provided for by Judgment and Decree in Condemnation, which adjudicated the rights of these appellants and cross appellant in and to said award and ordering distribution of the funds remaining in the Registry of the Court was entered on April 15, 1949 [R. 237-239]. Notice of Appeal, on behalf of Gawzners, was filed April 28, 1949 [R. 240]. Supersedeas and Cost Bond was filed by Gawzners May 5, 1949 [R. 241-244].

Concise Abstract of Case and Questions Involved.

This action was brought by the United States to condemn the temporary use of a completely furnished and equipped resort hotel entirely owned by Gawzners [R. 354] but leased to Lebenbaum for a period commencing before and extending beyond the term of taking [R. 275]. The lease was for the sole use as a resort hotel [R. 281], the rental was based upon a percentage of gross business of room rental and food and liquor sales, with a minimum guarantee [R. 281]. The lessee was to repair and maintain the hotel and grounds (except the exterior of buildings) [R. 285] and in addition was to maintain the furniture and equipment in the same condition as at the commencement of the lease [R. 287-290].

The lease also provided in part [R. 291]—"In the event the State of California or the County of Santa Barbara or *any other public body* shall by condemnation acquire any additional portion of said leased premises for highway or *other public purpose*, the amount of the award in any such condemnation suit shall belong solely to the lessors. . . . Further in this connection, should the effect of such condemnation be such as to reduce the

rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days written notice to the other" [R. 291-292].

After the taking Gawzners gave notice of cancellation of the lease [R. 305 and 354]. Gawzners were not paid for use of the premises during the taking by either Lebenbaum or the United States [R. 422] except as awarded a portion of the compensation in these proceedings. The United States did not restore the premises. After possession of the premises was returned to Lebenbaum, pursuant to order of the Court, Lebenbaum made only limited restoration of the premises.

The Decree in Condemnation made pursuant to stipulation of all parties fixed the sum of \$205,000 as compensation for the *taking* and *failure to restore* the premises without apportioning the same [R. 55]. Thereafter the rights of Gawzners and Lebenbaum to the award were litigated. During such trial it was stipulated that \$91,296 of the total award should be allocated to restoration [R. 356], of which by a subsequent stipulation \$10,500 was paid to Lebenbaum in repayment for restoration done by him and \$80,796 was paid to Gawzners [R. 98] and Gawzners completed the restoration of all of the property and the repair and replacement of furniture and equipment.

The balance of the compensation in the sum of \$113,704 was claimed by the Gawzners, *first*, because the lease had been canceled by the institution of the within pro-

ceedings and the giving of notice of cancellation pursuant to the condemnation clause above set forth; *second*, because the condemnation clause required the payment to Gawzners of the entire condemnation award even though the lease was not cancelled; and, *third*, that the remainder of said award constituted the reasonable value of the use of said premises and there was no bonus or market value in the lease and, accordingly, Gawzners, as the owners, were entitled to such reasonable value, there having been no property taken from Lebenbaum and he having suffered no compensable loss. Gawzners introduced expert testimony that the lease had no market value. Lebenbaum, on the other hand, claimed the entire balance on the theory that the leasehold interest only was taken and he was obligated to pay Gawzners rental during the period of taking, though the amount thereof was not specified and he had not paid Gawzners rent or other compensation during the occupancy of the United States. Lebenbaum also claimed he was entitled to a portion of the award based upon a division thereof on the ratio of past or prospective rental to Gawzners and profits to Lebenbaum [R. 463, 464]. Lebenbaum offered no testimony as to the bonus or market value of the lease [R. 434 and 443] but tendered in evidence through a hotel accountant a balance sheet and profit and loss statement for the period of his lease prior to the taking by the United States [R. 310 and 432] and a hypothetical profit and loss statement based upon prospective operations of the

hotel during the occupancy by the United States [R. 324 and 450]. Both these statements were received by the Court over objections of Gawzners and apparently constitute the basis of the Court's division of the award [R. 483 and 233]. The balance of the compensation was awarded by the Court as follows: To Gawzners \$69,344 (which included use of property not covered by the lease) and to Lebenbaum \$44,360, purportedly as a just and equitable distribution [R. 235 and 238].

The questions involved in this appeal are:

1. Did not the District Court err in holding that the condemnation clause did not apply to the case at bar?

a. To effect a cancellation of the lease upon the giving of notice by Gawzners.

b. To require the payment of the award solely to Gawzners even if it did not effect a cancellation of the lease."

2. Even if the condemnation clause did not apply to the case at bar, did not the District Court err in awarding Lebenbaum \$44,360, or any other sum, from the balance of said award for the following reasons:

a. The Court failed to award Gawzners the reasonable value of the use of the premises covered by the lease.

b. The Court ignored the undisputed testimony that the lease had no market or bonus value.

c. The Court permitted the introduction of testimony as to past and prospective profits of Lebenbaum.

d. The award to Lebenbaum of \$44,360 must have been predicated on such erroneous testimony of past and prospective profits. There is no other evidence to support the award.

e. The award of \$44,360 to Lebenbaum must have been for loss of business and prospective profits. There was no evidence as to market or bonus value of the lease nor evidence of any other damage or loss sustained by Lebenbaum.

f. The Court failed to award Gawzners the reasonable value of the use of the property not covered by the lease though the testimony was undisputed. The Court apparently reduced the amount found to be the market value by some undisclosed method.

g. The Court misinterpreted the stipulation of the parties as to the amount allocated to restoration and permitted such misinterpretation to affect the award of the balance of compensation.

h. The award of \$69,344 to Gawzners (including the value of the use of the property not covered by the lease) and \$44,360 to Lebenbaum is predicated on some ratio of rental payable for the use of the property condemned and prospective profits of Lebenbaum.

Specification of Errors.

1. The Court erred in finding and concluding that the lease between Gawzners and Lebenbaum was not cancelled by the institution of the within proceedings and the giving of Notice of Cancellation by Gawzners to Lebenbaum pursuant to the provisions of said lease and particularly Paragraph Ten thereof, in that such determination is contrary to the terms of said lease and the intent of the parties thereto.

2. The Court erred in finding and concluding that Gawzners were not entitled to the entire award pursuant to Paragraph Ten of said lease even if said lease was not cancelled, in that such determination is contrary to the terms of said lease.

3. The Court erred in ordering possession of the hotel portion of the premises returned to Lebenbaum upon termination of the term taken by the United States for the reason that the institution of the within suit and the giving of the Notice of Cancellation cancelled said lease and possession should have been returned to Gawzners.

4. The Court erred in finding and concluding that a just and equitable division of the award for the use of said premises (after deducting the amount allocated for restoration) was as follows: To Gawzners \$69,344; To Lebenbaum \$44,360, in that:

a. Said lease had been cancelled as set forth in specification 1 above.

b. The lease required all condemnation awards to be paid Gawzners as set forth in specification 2 above.

c. Such finding and conclusion in favor of Lebenbaum is not supported by any competent evidence.

d. Such finding and conclusion in favor of Lebenbaum is contrary to the undisputed evidence that the lease had no market or bonus value at the date of taking.

e. Such finding and conclusion fails to award to Gawzners, as owners of the only property the use of which was acquired by the United States, the reasonable value of such use or the reasonable rental value of said property as shown by the undisputed evidence.

f. Such finding and conclusion in favor of Lebenbaum was for his loss of business and prospective profits, consequently a distribution to him, from the award, of compensation not recovered or recoverable from the United States.

g. Such finding and conclusion was made on some ratio based upon the rental or use value of the property taken, owned by Gawzners, and prospective profits of Lebenbaum, consequently an improper method of distribution of a condemnation award.

h. Such finding and conclusion is not supported by any competent evidence.

5. The Court erred in holding in Finding 17 that there was no evidence as to whether or not a portion of the fund remaining for division, after the allocation of

\$91,296 for restoration, was to include compensation for the time necessary for restoration in that such finding is contrary to the stipulation of the parties concerning such restoration.

6. The Court erred in holding in Finding 18 that there was no evidence whereby the Court could make a finding as to excess wear and tear or excess costs of restoration in that such finding is contrary to the stipulation of the parties since all issues as to restoration were settled by such stipulation.

7. The Court erred in holding in Finding 19 that no evidence was introduced as to the portion of the funds allocated to restoration which were properly chargeable to Gawzners or Lebenbaum in that such finding is contrary to the stipulation of the parties settling the division of the restoration fund.

8. The Court erred in holding in Finding 19 that as to some items, restoration was made to an extent beyond that necessary to restore to the same condition as of the beginning of the lease and, therefore, not properly chargeable to restoration or damage caused by the United States, in that such finding is contrary to the stipulation that the sum of \$91,296 was the amount necessary for restoration and such finding is contrary to the evidence.

9. The Court erred in holding in Finding 19 that there was no evidence from which the Court could make a finding as to what portion of the fund was used or should have been used to restore the premises not covered by the

lease in that such finding is contrary to the stipulation of the parties settling all divisions of the restoration fund.

10. The Court erred in holding in Finding 22 that the sum of \$113,704 does not represent a sum which can be found to be the compensation for the use of the premises because the total judgment of \$205,000 had been depleted by an excess amount for restoration, in that such finding is contrary to the evidence and contrary to the stipulation of the parties.

11. The Court erred in considering in Finding 27 the profits which Lebenbaum, as lessee, received or might receive from the operation of the hotel business and the ratio of those profits to rental for the premises in that the loss of prospective profits from the operation of a business are not compensable in a condemnation action.

12. The Court erred in making Finding 28 in that such finding is contrary to the undisputed evidence.

13. The Court erred in admitting in evidence Lebenbaum's Exhibit A [R. 310-323, and 432], which is the financial statement of Lebenbaum showing a balance sheet as of October 1, 1944, and a profit and loss statement for the period of January 1 to July 15, 1944 with supporting schedules. This exhibit was admitted on direct testimony on behalf of Lebenbaum over objection of Gawzners that it was incompetent, irrelevant and immaterial, not proper direct evidence, did not tend to prove or disprove the issues in the case, *i. e.*, the market value of the leasehold interest; it has a tendency to establish the profits, which

the courts have held to be an improper basis for evaluation of property in condemnation proceedings; it calls for speculative and conjectural testimony, *i. e.*, the profits made from the operation of a business; and is improper on direct examination [R. 432].

The Court erred in refusing to strike said Exhibit A upon motion of Gawzners made upon the same grounds as stated in the objection to receiving the exhibit in evidence [R. 433]. [Ruling appears R. 187.]

14. The Court erred in admitting in evidence Lebenbaum's Exhibit B [R. 324-331 and 450] which is an *estimated* profit and loss statement based upon the *assumed* operation of the hotel during the first year of the occupancy by the United States calculated in part from Lebenbaum's past experience, in part from national averages and adjusted to results achieved in other hotels [R. 324 and 450]. This exhibit was admitted on direct testimony on behalf of Lebenbaum over objection of Gawzners that it was incompetent, irrelevant and immaterial, that it was conjectural and speculative and an attempt to prove future profits in a condemnation proceeding and that no portion of the award made in the action between the United States and the defendants included an item of estimated profits [R. 450].

The Court erred in refusing to strike said Exhibit B upon motions of Gawzners made upon the ground that it was an attempt to recover out of a condemnation proceeding by anticipating profits that might have been made [R. 463] and upon the ground the witness conceded the report to be speculative [R. 468-469] and upon the renewed grounds that it was speculative, an attempt to show profits, conjectural, and improper evidence in a con-

demnation proceeding or in any apportionment of an award rendered in a condemnation proceeding [R. 473] [Ruling appears R. 187].

15. The Court erred in admitting in evidence and in failing to strike the testimony of the witness Lloyd S. Pettegrew, produced by Lebenbaum, relating to past and prospective profits of the operation of said hotel as shown by said Exhibits A and B. The objections and motions to strike were made on behalf of Gawzners on the same grounds as made to said Exhibits A and B.

16. The Court erred in refusing Gawzners permission to file Paragraphs IV, V, XX and XXI of their Cross-Complaint and Exhibit B attached thereto in that Gawzners were unable to produce evidence as to matters occurring subsequent to the date of surrender of the premises and thus have adjudicated matters growing out of this litigation.

17. The Court erred in not signing the Findings of Fact proposed by Gawzners in that said Findings of Fact were in accord with the evidence.

Summary of the Argument.

1. It is contended the Court erred as a matter of law in concluding [Conclusion 2, R. 234] that the lease between Gawzners and Lebenbaum was not cancelled by the institution of the within proceedings and the giving of Notice of Cancellation by Gawzners to Lebenbaum. The Court found the existence of the condemnation clause in the lease [Finding 5, R. 218] that the United States took possession of the entire property pursuant to the within condemnation proceedings [Finding 6, R. 219] and that the Gawzners gave Notice of Cancellation under the terms

of said condemnation clause [Finding 8, R. 220]. No contention was made that the language of said condemnation clause was ambiguous, nor was any testimony introduced attempting to explain or vary the terms thereof. We contend the Court ignored the plain language of said clause in holding that the same did not apply to the within action. We contend that such holding is contrary to the express language of the lease and contrary to the intent of the parties as expressed in that lease.

2. We contend that the Court erred as a matter of law in concluding the Gawzners were not entitled to the payment of the entire award in the within proceedings [Conclusion 4, R. 235], in that such conclusion is contrary to the express language of the condemnation clause of the lease and the Court erred in determining that such clause was not applicable to the within proceedings.

3. We contend that the Court erred in concluding [Conclusion 7, R. 235] that a just and equitable division of the remainder of the award (after deduction of the agreed costs of restoration) was \$69,344 to Gawzners and \$44,360 to Lebenbaum. Such contention is fundamentally based upon the alleged error of the Court in permitting Lebenbaum to introduce evidence of past and prospective profits and then using such erroneous testimony as a basis for the Court's purportedly equitable distribution of the award, *i. e.*, in the words of the Court [R. 486] “. . . the Court is trying to divide the remainder of this money that is available in an equitable manner, as nearly as possible according to what each would have received had the

hotel been operated during those years under the lease.” Inherent in this argument are the specific alleged errors of introduction of testimony; alleged disregard of settled rules of law that a defendant may recover only for damage which he sustains, which does not include loss of prospective profits or loss to business; alleged disregard of settled rules that a tenant may only recover bonus or market value of a lease when he has not paid the rent reserved in the lease or the reasonable value of the use of the premises during the period of taking; alleged disregard of undisputed testimony that the lease had no such bonus or market value; alleged misinterpretation of the stipulation in reference to restoration; findings in reference to such restoration alleged to be without support in or contrary to the evidence; that such division did not give just compensation to Gawzners while giving Lebenbaum a portion of the award for a non-compensable loss, *i. e.*, for loss of prospective profits, for which no recovery was had from the United States; and that there was no competent evidence to sustain the award made by the Court.

Before commencing our arguments we submit that the abstract of the case and questions involved, hereinbefore set out, present the only material matters and issues of this case. We concede there were many side issues and ramifications. It is submitted that such matters only confuse the main issues. To even state them in this brief would extend it beyond the permissive length. The District Court’s summary of the case appearing in the Memorandum of Conclusions covers 71 pages of the record [R. 105-176].

ARGUMENT.

The District Court Erred in Holding That the Condemnation Clause Did Not Effect a Cancellation of the Lease and Require Payment of the Award to Gawzners.

There has been set out in the abstract of the case the pertinent parts of Paragraph Ten of the lease, which has been referred to herein as the "condemnation clause." The full clause appears at R. 291.

In connection with a discussion of this phase of the case it should also be kept in mind that Paragraph Two of the lease [R. 281] provides in substance that the premises shall be used solely for the purpose of carrying on the business of operating a hotel, cafe, bar and restaurant and that the same shall be continuously operated as such. Paragraph Three of the lease [R. 281] provides that the lessee shall pay as rent for the premises 35% of the gross business from the rental of cottages, rooms, cabanas, lockers and beach privileges; 15% of the gross business from the sale of beer, wine and liquor; and 5% of the gross business from the sale of all food, with a provision for a minimum rental of \$1500 per month. Provision is made to reduce these percentages to 30, 10 and 5, respectively, when in a calendar year the percentage rental reached the sum of \$45,000 [R. 283]. The rental thus required to be paid is based almost entirely upon the gross business done. It has no relation to the profits that may or may not be obtained by the lessee. When we thus consider that the rental for the premises was dependent in a large extent upon the amount of gross business done and the lease provides that the lessee shall continuously operate the premises as a hotel, we see that the whole intent and purpose of the parties was to continuously operate the hotel

as such. We have the intent of the parties so expressed throughout the entire lease and that intent must be kept in mind in an interpretation of the condemnation clause. Not only did the lease provide that it should be operated as a hotel but that it should be so operated by the lessee.

Paragraph Twelve of the lease [R. 293] prohibited the lessee from assigning the lease or subletting the premises without the written consent of the lessor.

Paragraph Twenty-one of the lease [R. 299] gives the lessors the right to terminate the lease in the event of bankruptcy or other assignment by law.

The condemnation clause specifically provides

“Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days’ written notice to the other.”

Again we submit that the reading of this clause in conjunction with the entire lease, particularly the portions we have hereinabove referred to, gives substance to this portion of the clause. If fifty (50) per cent or more of the rentable rooms were affected by condemnation there would be a substantial effect upon the rental to be paid to the lessor under the terms of the lease and in all probability there would be an effect upon the operations of the lessee. In accordance with the terms of this clause Gawzners gave Lebenbaum a Notice of Cancellation [R. 305-309], which was served upon Lebenbaum on or about August 11, 1944.

18 *Am. Jur.* 866, Eminent Domain, Sec. 232, states the general rule as follows:

“Of course, if the lease itself includes a provision in respect of the rights of the parties in the event of the condemnation of the leased premises, such provision is controlling, if applicable to the particular case. Thus, where, by its terms, an appropriation for a public use terminates the lease, the lessee is entitled to no compensation for the taking.”

This rule of law has been frequently recognized by the Courts.

In *United States v. Petty Motors Company*, 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729, the Government took a temporary use. The lease of one of the tenants provided in part—

“If the whole or any part of the demised premises shall be taken by Federal, State, county, city, or other authority for public use, or under any statute, or by right of eminent domain, * * * the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor * * *.”

In reference to that matter the Court said:

“The lease of the Independent Pneumatic Tool Company included a clause for its termination on the Federal Government’s entry into possession of the leased property for public use. The events connected with the Government’s entry just set out appear to meet the requirements for termination. * * * If the Tool Company, with its termination on condemna-

tion clause, was the only tenant and condemnation of all interests in the property was decreed, the landlord would take the entire compensation because the lessee would have no rights against the fund. * * * The Tool Company had contracted away any rights that it might otherwise have had * * * With this type of clause, at least in the absence of a contrary state rule, the tenant has no right which persists beyond the taking and can be entitled to nothing.”

The case of *United States v. Improved Premises, etc.*, 54 Fed. Supp. 469, was an acquisition of the use of certain premises for a term of years. The property was leased at the time of taking and the lease contained the following language:

“If the whole, or any part, of the demised premises shall be taken or condemned by any competent authority for any public or quasi public use or purpose, then, and in that event, the term of this lease shall cease and terminate from the date when the possession of the part so taken shall be required for such use or purpose, and without apportionment of the award.”

The tenant attempted to obtain compensation and in denying that right the Court said, at page 472:

“It is to be observed that the Government in this proceeding was not authorized to and does not take any of the tenant’s property except possibly the unexpired term of its lease. However, here the tenant has, by the express terms of its lease, foreclosed any right on its part to receive any part of the award and

has consented that upon the taking its lease shall cease and terminate. Matter of New York (Tri-Borough Bridge), 249 App. Div. 579, 293 N. Y. S. 223, affirmed without opinion 274 N. Y. 581, 10 N. E. (2d) 561.”

It will be noted that the above decision held that the language of the lease was sufficient to cancel the same and in addition thereto that the tenant by the language of the lease had foreclosed any right to receive any portion of the award.

In *United States v. Land*, 57 Fed. Supp. 548, the clause in the lease provided:

“If * * * said premises * * * shall be taken for street or other public use * * * this lease * * * shall terminate at the election of the lessor * * *.”

The lessor gave notice of termination following the filing of a condemnation suit. The tenant appeared in the condemnation proceeding and the owner moved to dismiss the tenant’s claim. The Court there said:

“The Court is presented with this question: Does the above-mentioned provision in the lease and exercise of the right of election by Fargo to terminate the lease prevent Brown from sharing in the condemnation award?”

The Court then discusses several Massachusetts cases and stated:

“It is apparent from what has been stated in the Goodyear case, where there was a taking of the whole premises as in the instant case, that where a lease

contains a provision similar to that in the Fargo lease and an election is made 'to terminate the lease' the right of the lessee to share in the damages is terminated by virtue of such election."

U. S. v. 21,815 Square Feet of Land, etc., 59 Fed. Supp. 219, was an action to acquire the temporary use of certain premises leased to various tenants. Each of the leases contained the following condemnation clause:

"If the whole or any part of the demised premises shall be taken or condemned by any competent authority for any public or quasi-public use or purpose, then, and in that event, the term of this lease shall cease and terminate from the date when the possession of the part so taken shall be required for such use or purpose, and without apportionment of the award. Current rental, however, shall in any such case be apportioned."

One tenant claimed the right to compensation for the unexpired term of its lease, and in denying that right the Court said, at page 221:

"A condemnation clause similar to the one in the instant case, together with an alteration clause almost exactly like the one before me, were at issue, and the legal effect of these clauses was exhaustively set forth in an opinion recently handed down in the case of *U. S. v. Improved Premises, known as No. 48-70 McLean Avenue in the City of Yonkers, D.C. S. D. N. Y.*, 54 Fed. Sup. 469. There the Government acquired the unexpired term of a tenant's lease and there, as here, the tenant claimed and sought pay-

ment for the installation of improvements for the unexpired term of its lease and for the interruption and impairment of its business. The McLean Avenue case held that by the express terms of the tenant's lease it foreclosed any right on its part of the award and consented that upon the taking of the property by the Government for use and occupancy its lease ceased and terminated. This case, as far as I can learn, has not been reviewed, but it seems to me it has all the elements of sound reasoning and logic. * * * The language of the condemnation clause is in itself all embracing and I think it included the condemnation of any property whether the fee was taken or only use and occupancy."

The Court further held in this decision that where a lease was made which included a condemnation clause the tenants knew or should have known, and are chargeable with the knowledge, that the Government and its agencies could and had the power to acquire use and occupancy, both under the First War Powers Act passed July 2, 1917, and the Second War Powers Act adopted March 27, 1942.

In the case of *Straszszula Bros. Co. v. Fargo Real Estate Trust* (C. C. A. 1st), 152 F. 2d 61, the Court held that under a condemnation clause of the lease that the tenant was not entitled to recover. That clause provided in substance that if the premises or any part thereof should be taken for a street or other public use, then the lease and the term demised should be terminated at the election of the lessor.

U. S. v. 10,620 Square Feet, etc., 62 Fed. Supp. 115.

In this case the Government was taking the temporary use of certain premises which were under leases to various tenants. Each of the leases contained a condemnation clause identical to that set forth in the case of *U. S. v. 21,815 Square Feet of Land, etc.*, 59 Fed. Supp. 219, just hereinbefore quoted. In discussing this clause the Court said at page 120:

“The agreement is undoubtedly between and referable to the status of the landlord with the tenant. Here the landlord claims the whole award and insists that the clause quoted conclusively determines that question. * * * the Government is only required to pay just compensation for the use and occupancy taken. The fair rental value of that use, which is what the General Motors case decides should be paid, has been stipulated at \$2.00 per square foot, and none of the defendants question it. * * * Whatever claims the tenants might have are encompassed within that amount. The question really is, how shall the amount be distributed as between landlord and tenants. As between them the condemnation clause terminates the tenancies as of January 1, 1945 [the date possession was taken by the Government] and there shall be no apportionment. The tenancies were thus terminated as of that date and there was nothing belonging to claimants for the Government to take. * * * The condemnation clause cannot be limited to a taking of the fee. It specifically refers to a taking of the whole or part of ‘demised premises.’

The property taken was that of the landlord's. By the agreement the claimants' interest ceased on the taking—January 1, 1945."

U. S. v. 45,000 Square Feet of Land, etc., 62 Fed. Supp. 121, is to the same effect.

The condemnation clause in the case at bar also provides:

"In the event the State of California or the County of Santa Barbara *or any other public body* shall by condemnation acquire any additional portion of said leased premises for highway or *other public purpose*, the amount of the award *in any such condemnation suit shall belong solely to the lessors * * *.*"

It is submitted that under the authority of the cases heretofore cited that in the case at bar by virtue of this language of the condemnation clause the award is payable entirely to the Gawzners regardless of whether or not the lease would be cancelled. It seems to us that it cannot be doubted that the words "any other public body" include the United States of America.

In *54 Am. Jur. 521, United States, Section 2*, it is stated:

"In one sense the United States may be defined as a government and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment."

The above statement from American Jurisprudence is a quotation from the case of *Van Brocklin v. Anderson*, 117 U. S. 151, 29 L. Ed. 845. That the United States of America is not a person or a corporation has been recently held in the case of *United States v. Cooper Corporation*, 312 U. S. 600, 85 L. Ed. 1071. The United States must necessarily then be within the definition of the terms "any other public body." It seems inevitably to follow, therefore, that under the remaining portion of said sentence, *i.e.*, "the amount of the award in any such condemnation suit shall belong solely to the lessors," that the award in the case at bar must be paid to the defendants Gawzner. It cannot be controverted that the purpose for which the Government took possession of the property was "a public purpose" or otherwise there would have been no right to bring the action in eminent domain.

We respectfully submit that for this Court to affirm the decision of the lower Court in reference to this condemnation clause it must be determined that the United States is not a "public body" and that the condemnation was not for a "public purpose" and that the taking of the temporary use of the entire hotel and grounds was not a condemnation the effect of which was "to reduce the rentable rooms in said hotel by fifty (50) per cent," or such a condemnation as "to preclude the subsequent use of the beach forming part of the leased premises." We submit that such a decision would not be justified in view of the language of the many cases which we have heretofore cited.

The Judgment of the Court Distributing the Award Was Erroneous.

The Judgment and Decree in Condemnation, entered upon the stipulation of all parties, fixed the sum of \$205,000 as compensation for the *taking of the use* of the property involved and the *failure to restore* the premises for damage done during the occupancy of the United States [R. 55]. This stipulation for judgment and the judgment were made on November 26, 1946, more than a month after the impanelment of a jury to try the main case and during which time there had been sundry contentions made, argued, and briefed and various attempts made at settlement. The settlement with the United States was for a lump sum. No attempt was made to break down the amount thereof into the reasonable value of the use of the premises or into the amount necessary for restoration. Both amounts had been the matter of dispute. By the judgment the Court retained jurisdiction to determine the amount of the interests of the Gawzners and Lebenbaum (the only persons interested in the award) [R. 58].

“* * * The same as though a jury had rendered a verdict for said sum of \$205,000, without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking * * *.”

After this Judgment was entered and the award was paid into the Registry of the Court the matter came on for trial as to the distribution of the award between Gawzners and Lebenbaum. The Court denied formal motions, made upon the grounds heretofore contended for in this brief,

to distribute the award to Gawzners pursuant to the condemnation clause of the lease. It was then stipulated between the Gawzners and Lebenbaum,

“That the portion of the award made by the Judgment of November 26, 1946, in the within cause, that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of \$91,296” [R. 356].

This stipulation did not purport to allocate who should receive the same but it was the agreed amount to restore the premises to their condition as of July 10, 1944, including all items of ordinary wear and tear that occurred during the United States' occupancy as well as all items of restoration for damage in excess of ordinary wear and tear [R. 435]. As a result of this stipulation it is apparent that upon the restoration being done the property would be placed in the same condition it was in when the United States took possession. (Later by further stipulation this sum was paid \$10,500 to Lebenbaum, and \$80,796 to Gawzners, who completed the restoration.)

Having stipulated that \$205,000 was the compensation for the *taking* and *restoration* and that the sum of \$91,296 was the allocation for restoration, the necessary consequence was that the sum of \$113,704, the remaining balance, was the *compensation for the taking* of the premises during the period of the occupancy by the United States, including land owned exclusively by Gawzners.

Here the theory of the Gawzners and the theory of Lebenbaum diverged. Gawzners contended, first, that they should be paid the reasonable value of the use of the land outside the lease. The testimony that the market value

of the use of this land was \$10,950 was undisputed. [See testimony of *Allen*, R. 382 and *Frisbie*, R. 395.] Counsel for Lebenbaum conceded that the evidence was true that the value of that property was \$10,950 [R. 444 and 488]. The Court found the market rental value of such areas to be \$10,500. [The Court may have been under misapprehension that the witnesses testified to a sum of \$10,500 instead of \$10,950. See the Court's Memorandum of Conclusions at R. 160 and 162.]

Gawzners contended, second, that after deducting the value of the use of such outside land that the remaining portion of the fund would be the reasonable market rental value of the use of the hotel and the furniture, furnishings and equipment thereof; that no rent or other compensation for the use of that property during the period United States had occupied the same had been paid; that such remaining balance should therefore be distributed between Gawzners, as lessors, and Lebenbaum, as lessee, by distributing to Lebenbaum the bonus or market value of the lease, if any, and the remainder to Gawzners.

On the other hand, Lebenbaum's theory was, first, that though conceding the Court should award Gawzners the rental value for the use of the outside land [R. 375], nevertheless it should be in some amount less than the market value of such use because there was not enough money remaining, after deduction of the agreed amount of restoration, to pay Gawzners in full for this area and leave enough to pay for the rest of the property [R. 444 and 488]. Second, that after payment for the area not under lease that the remaining balance should be distributed to Lebenbaum since it was from him that the lease was taken by the United States; and, third, that if the

Court divided the award it should be upon a ratio between the rental value of the property and the profits which Lebenbaum would have made had the hotel been operated during the occupancy by the United States [R. 463, 464] contending that the bonus value theory was irrelevant [R. 393] and that the testimony of the witnesses Allen and Frisbie in reference to such bonus value was irrelevant because they failed to take into account the business operation of the property by Lebenbaum [R. 424].

In support of their theory Gawzners produced the witness Allen, who qualified as an expert [R. 365-371], and stated that he had examined the property, was familiar with the lease in question and had examined the financial reports during Lebenbaum's occupancy [R. 372-373] and then stated that in his opinion the lease had no market or bonus value [see R. 374 for the exact language of the question, R. 377 for the witness' answer] and gave his reasons for such opinion [R. 377-381].

Gawzners also produced the witness Frisbie, who qualified as an expert [R. 386-390], and stated that he had examined the property, was familiar with the lease in question and had examined the financial reports during Lebenbaum's occupancy [R. 390, 391] and then stated that in his opinion the lease had no market or bonus value [see R. 391 and 392 for the exact language of the question, R. 393 for the witness' answer] and gave his reasons for such opinion [R. 393, 394].

Lebenbaum presented no evidence of the market or bonus value of the lease in question. The witness Pettegrew, produced by Lebenbaum, was not questioned about nor did he testify to the market value of the lease in question [R. 443]. Pettegrew qualified as an accountant

[R. 425, 426] and identified Lebenbaum's Exhibit A [R. 426], the profit and loss report which was received in evidence over the objection of Gawzners [R. 432]. Counsel for Lebenbaum then stated that he had no further testimony to offer and was not going to put on any experts as to value [R. 434].

It is respectfully submitted that the Court was persuaded to these erroneous theories advanced by Lebenbaum. The Court not only received said Exhibit A in evidence, but some months later in stating that he desired further evidence in the case made the following comments [R. 438]:

“I believe it is true that both the lessor and lessee have an interest in the property. What that interest was worth to each of them and what figure would have influenced them to consent to a sub-lease, * * * would have been determined by them, I believe, in this manner;

“I believe that the Gawzners would have demanded that they receive from the new tenant the rent to which they were entitled under the lease * * *

“Mr. Lebenbaum in also fixing the figure for which he would sublet the property, sublease the property, *would take into consideration how much he had earned in this enterprise and how much he was likely to earn before naming a figure.* I am not stating that in a condemnation case the profits likely to accrue can be recovered from the condemnor, *but it is my belief that such profits should be considered,* both by the seller and the buyer in arriving at a market value of the property involved.” (Italics ours.)

(This method of valuation is specifically disapproved by *United States v. 26,699 Acres of Land, etc.*, 174 F. 2d 367, hereinafter discussed.)

During the same discussion the Court also stated [R. 443];

“I should like to have evidence presented by a witness who would place himself in the position of a prospective buyer on July 10, 1944, one who would take the figures for the previous six months operation and try to arrive at similar figures for the period during which the property was to be subleased, to wit, the period named in the Third Amended Complaint.”

And further stated that he desired each side to produce testimony as to the value of the lease taking into consideration the profits that would have been made by the lessee during the period of the United States' occupancy [R. 445].

Counsel for Gawzners respectfully declined to produce such testimony [R. 446]. Lebenbaum again produced witness Pettegrew, who presented a statement with respect to the Miramar Hotel [Lebenbaum's Exhibit B] and stated [R. 449]:

“The report consists of an estimated profit and loss statement for the year ending July 10, 1945. It further shows a division of income as between the landlord and tenant. * * * There is a profit and loss statement. * * * In arriving at my conclusions in preparing this report I placed myself

back on July 10, 1944, and estimated or projected forward the operation for one year. This was done on the basis of past results both in the Miramar Hotel and similar hotels in Santa Barbara and other resorts in California and by the use of trends that were in vogue or were existing at that time.”

Gawzners objected to the introduction of said report on the grounds set forth in Specification of Error No. 14. The witness Pettegrew was cross-examined in detail in reference to said report for the purpose of establishing that the same was conjectural and speculative and it is respectfully submitted that such cross-examination so established [R. 451-473]. In the course of said examination the witness conceded that said Exhibit B was merely a hypothesis [R. 461], that it was speculative [R. 468] and that upon the assumed operations set forth in said Exhibit B the rental that would be paid to the landlord (Gawzners) for one year would be \$91,684.02 and for the $22\frac{2}{3}$ months that the United States was in occupancy the rental would have been \$173,112.80, and that under the terms of the lease a prospective purchaser would have to have paid that rental if he had done the assumed amount of business whether or not he made a cent from the operations [R. 472]. The exhibit shows that for the estimated year of July 10, 1944 to July 10, 1945, the tenant's profits would have been \$84,469.93 or that the ratio between the rental and the profits of the tenant would be—rent 52.04%, tenant's profits 47.96%. In discussing the report, Exhibit

B, the following statements took place between the Court and Mr. Hearn, counsel for Lebenbaum [R. 462]:

“The Court: Then, I understand the witness is testifying as to a figure which might be used as a profit that a well-informed buyer might anticipate he could make out of the hotel during this operation, under lease, for a period of one or two years from the taking?”

Mr. Hearn: Yes, your Honor. That is what I understood was your Honor’s suggestion.”

[R. 463] “The Court: *You were attempting to effect a division of the moneys available, based on the profits which might have been anticipated?*”

Mr. Hearn: *Yes; that is true, your Honor.*

The Court: *I believe that is the same thing I had in mind * * *.* (Italics ours.)

Mr. Hearn: It is not an attempt, if your Honor please, to recover profits as such at all. It is an attempt to recover value, taking into account prospective profits, for the purpose of determining value. We are not trying to recover profits, certainly.

The Court: You are trying to apportion this money according to the formula worked out by this exhibit?”

Mr. Hearn: That is right.”

The Court again stated [R. 486]:

“The Court: I think counsel are aware of the fact that the Court is trying to divide the remainder of this money that is available in an equitable manner, as nearly as possible according to what each

would have received had the hotel been operated during those years under the lease. That is my ultimate aim. I know that is contrary to your theory, Mr. Burrill.

Mr. Burrill: Yes, your Honor. I concede that it is.

The Court: How does that appeal to you, Mr. Hearn?

Mr. Hearn: If your Honor please, I will be frank to say that, if we could arrive at such a conclusion in this case and if, by that means, we could further arrive at a final judgment, and I mean a non-appealable judgment, then that would be quite satisfactory to me, but, if it does not so result, then I will reserve all rights of appeal on the theory that I have heretofore previously expressed" [R. 487].

That counsel for Lebenbaum was doubtful of the validity of a judgment based upon such division is further clearly established by his very frank statement [R. 487]:

"* * * I am very much afraid of an appeal by the defendants Gawzner from any judgment arrived at, based on testimony such as that which Mr. Pettegrew has given. And I, frankly, would have my serious doubts of the validity of such a judgment * * *."

We have gone to this length to clearly demonstrate the alleged errors of the Court and particularly to demonstrate that the District Court must have arrived at its decision based upon this erroneous testimony. It is not possible

from the Findings or the evidence, to ascertain with exactitude how the Court reached its ultimate decision. If the Court allowed to Gawzners the full market rental value of the use of the lands not covered by the lease, namely, in the amount of \$10,500 [Findings 23 and 24, R. 232], the award to Gawzners for the taking of the hotel premises would be the sum of \$58,844 (\$69,344 minus \$10,500) for the entire term of the taking by the United States, *i.e.*, $22\frac{2}{3}$ months. This in spite of the evidence that during the six months occupancy of Lehenbaum under the lease during the slack season [R. 477], he had paid Gawzners an average of \$5000 per month [R. 434]. It is seen that the Court allowed Gawzners for the $22\frac{2}{3}$ months less than in all probability Gawzner would have received for one year of the operation of the hotel. In fact by the computations of Mr. Pettegrew in Exhibit B a tenant would have paid Gawzners \$91,684.02 rental per year or the sum of \$173,112.80 for the $22\frac{2}{3}$ months. Our inability to determine how the Court made its award was apparently shared by counsel for Lehenbaum in excusing himself, in a letter to the Court, from submitting a proposed set of findings of fact and conclusions of law [R. 188]:

“* * * I find myself unable at this time to prepare a complete set of findings and conclusions for the reason that I am unable to devise any factual basis from which a calculation can be made resulting in the precise figures of the division of the award made by Your Honor.”

The Bonus Value Is the Proper Measure of the Lessee's Interest In the Award.

It is respectfully submitted that it is the fundamental and uniform law that in a condemnation proceeding a tenant recovers the market or bonus value of his lease, namely, the amount equal to the excess of the rental value over the rent reserved. This rule is particularly pertinent where the lessee has not paid the landlord any rent during the period condemned as in the case at bar.

In *United States v. Petty Motors Company*, 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729, the United States Supreme Court very clearly points out that it is the bonus value only which the tenant is to receive. In that case the government had settled directly with the landlord (p. 374; p. 732 L. Ed.). In the last paragraph of the majority opinion, the Court states the measuring rod for the value of the tenant's share in these words:

“The measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, * * * less the agreed rent which the tenant would pay for such use and occupancy.”

We do not conceive that any different rule should apply in the case at bar where the entire compensation for the use of the premises has been paid into the Registry of the court pursuant to the Decree in Condemnation and the Court has retained jurisdiction to divide that award between the landlord and the tenant. In the case at bar if the rental payable by Lebenbaum to Gawzners had been a flat sum of so many dollars per month, it would be readily conceded, we believe, that after determining the amount of restoration the remainder of the compensation recovered from the United States would have been payable

first to Gawzners in the amount of such rent reserved by the lease, and the remainder, if any, to Lebenbaum as the bonus value of his lease. We submit that the rule of law is not changed because we have a percentage lease in the case at bar. The question still remains, were the percentages called for by the lease the fair market value of the rental of said premises? If the percentages called for by the lease were equal to the fair market rental value of the use of the premises, then there was no bonus value in the lease. The United States is required by law to pay nothing more than the market value or fair rental value for the use of the premises.

The same rule of law is announced in *John Hancock Mutual Life Insurance Company v. U. S.* (1946 C. C. A. 1st), 155 F. 2d 977. In that case the government condemned the temporary use of certain space in an office building. The Insurance Company occupied certain offices therein under a five year lease, which began prior to and ended after the government's occupancy. The District Court instructed the jury it could award damages to the tenant only if the fair market rental of the premises in question exceeded the rent reserved under the lease. The jury found that the tenant was not entitled to damages. The tenant appealed on the ground that it was entitled to the fair rental value undiminished by the rent it was obligated to pay under the lease. The Circuit Court, in affirming the lower Court, stated there was no evidence introduced to show whether the tenant was under continuing obligation to pay the rent but a footnote to the decision (p. 978) indicated that by arrangement between the United States and the owner the tenant was relieved of his obligation to pay rent. The Court said at page 978:

“If, after a condemnation, a lessee remains under obligation to pay rent, it is entitled to damages equal

to the fair rental value of the leased premises. If the lessee is no longer under such obligation, then it is entitled only to the difference between the fair rental value and the rent stipulated in the lease. In harmony with this is the rule of damages laid down by the Supreme Court in *United States v. Petty Motor Company*, 66 S. Ct. 596, 601. There the Court said: 'The measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term * * * less the agreed rent which the tenant would pay for such use and occupancy.'

"*United States v. General Motors Corporation*, 1945, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R., 390 cited by appellant is not in point. In that case the tenant was under a continuing obligation to pay rent and hence was entitled to the fair rental value undiminished by the rental under the lease."

In the case at bar it was proved beyond question that Gawzners have not received rental or other compensation while the United States occupied the premises and in particular that Lebenbaum did not pay such rent [R. 422, 423].

The same rule of law was approved in *Galvin v. Southern Hotel Corporation* (1947 C. C. A. 4th), 164 F. 2d 791. The temporary use of hotel premises was taken by the government. A Judgment in Condemnation was entered pursuant to agreement of the landlord and tenant, on the one hand, and the government, on the other hand, both for the use of the premises and in a separate amount for restoration. The District Court distributed the restoration fund to the landlord and divided the remainder between the landlord and tenant. The Circuit Court approved such action.

In many respects this *Galvin* case is strikingly similar to the case at bar. In addition to the method of settlement with the Government the lower Court retained jurisdiction to divide the award between the landlord and tenant as was done in the case at bar. The lease in that case was on a percentage basis of gross receipts of the tenant with a minimum guarantee. This is again in accord with the facts in this case. However, the lease in that case was made many years before the Government's occupancy so that the rental value at the time of taking was greatly in excess of the rent named in the lease and in that respect the facts differ from the case at bar. In that case the tenant first contended that the landlord should receive nothing more than the minimum rental specified in the lease and in the second place that if he was given anything more than the minimum rental it should bear a ratio to the lessee's earnings. This is similar to *Lebenbaum's* contentions in the case at bar. The Circuit Court disapproved of these contentions saying, at page 793:

“Nor do we think it would be equitable, as the lessee contends, to relate the distribution of the money to the profits which, * * * he would have made if he had remained in business in 1944 and 1945. * * * The complete answer to the contention, however, is that the additional rental payable to the lessor [the percentage rental] under the lease was not based upon profits to be gained by the lessee but on a percentage of his gross receipts. * * * ”

In the case at bar the percentage rental due to *Gawzners* was based upon a percentage of the gross business done and had no bearing upon the profits of the lessee [R. 281].

We submit the foregoing cases conclusively established that in the case at bar the Court departed from the proper measure of *Lebenbaum's* share in the award for the use of the premises.

The Court Erred in Admitting Evidence of Loss of Profits.

As we have heretofore seen the only testimony offered by Lebenbaum to support his contentions that he was entitled to a share of the compensation paid for the use of the premises was the introduction of his profit and loss statement for the six months prior to occupancy by the United States, being Lebenbaum's Exhibit A, and the introduction of Exhibit B, the hypothetical profit and loss statement prepared by the witness Pettegrew. Seasonable objections were made to the introduction of both of these exhibits (See Specifications of Error 13 and 14). We respectfully contend that the admission of these documents in evidence was error and contrary to the uniform and well-settled rules of law.

18 Am. Jur. 899, Eminent Domain, 259:

“It generally has been assumed that injury to a business is not an appropriation of property for which compensation must be made. * * * Accordingly, it may be stated as a general rule that injury to business or loss of profits, * * * is not to be considered as an element of damages in eminent domain proceedings * * * ”

Annotated cases 1918 B, page 878 (Note):

“No damages can be recovered for the good will of a business interfered with by the taking of property under the right of eminent domain (citing cases)”

and again at page 879 of the same volume:

“It is generally held that speculative or future profits of a business are not such elements of damage as may be considered in ascertaining the value of property taken under the power of eminent domain (citing cases).”

Joslin Manufacturing Co. v. Providence, 262 U. S. 668, 67 L. Ed. 1167, 43 S. Ct. 684:

“Injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation. (Citing Cases)”

Mitchell v. United States, 267 U. S. 341, 69 L. Ed. 644, 45 S.Ct. 293:

“The settled rules of law, however, preclude his considering in that determination consequential damages for losses to their business, or for its destruction. (Citing cases) No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land.”

This general rule of law has been carried into a situation where only a temporary use is taken or leased premises. In *United States v. General Motors*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R. 390, the court specified certain elements that might be taken into consideration in fixing the market value that the long term tenant would charge the government as the temporary occupier of the premises and then stated:

“Proof of such costs as affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning.”

The rule is again approved by the United States Supreme Court in *United States v. Petty Motors Company, supra*, where the Court said at page 377 (p. 734, L. Ed.):

“Since ‘market value’ does not fluctuate with the needs of the condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings. (Citing cases)”

Counsel for Lebenbaum in offering said Exhibits A and B denied that he was attempting to recover profits as such [R. 463]:

“Mr. Hearn: It is not an attempt, if your Honor please, to recover profits as such at all. It is an attempt to recover value, taking into account prospective profits, for the purpose of determining value. We are not trying to recover profits, certainly.”

It is respectfully submitted that this contention of counsel is but a play upon words when the only evidence were such exhibits. No evidence was offered by Lebenbaum as to the market value of the lease. Pettegrew was not qualified as such an expert and objection was made by Gawzners to any testimony along that line [R. 462]. We submit that to offer only evidence of past and prospective profits and yet to deny that there was an attempt to recover profits is an absurdity. Even to admit such testimony as a basis for determining market value is error. That the District Court adopted these past and prospective profits as a basis for its decision or at least considered them is inherent in the decision. Otherwise there would be absolutely no evidence in the record to support a judgment in favor of Lebenbaum. In fact the sole competent

evidence is that there was no bonus value in the lease (testimony of Allen and Frisbie).

The consideration of past and prospective profits in fixing an award for a lessee's interest that has been condemned has been specifically disapproved. In *United States v. 26,699 Acres of Land, etc.* (1949 C. C. A. 5th) 174 F. 2d 367, the government was condemning certain property subject to a leasehold. In that case evidence as to anticipated profits of the lessee was permitted by the lower Court, over objection, and the Court instructed the jury:

“Gentlemen, you would not be authorized to allow anticipated profits as such, but you may take such proof as there may be into consideration in determining the value of the unexpired leasehold at the time the property was taken by the government.”

The Circuit Court held that such procedure upon the part of the District Court was error and said:

“In the condemnation proceedings the United States did not take * * * the business of appellees, nor the services of those skilled in that business, and the Government should not be required to pay for the business experience, skill, and services, * * * of the owners when same were in no wise acquired by the condemnation proceeding. There is no obligation to pay more than such part of the fair market value of the leasehold as exceeds the annual rental.”

“The trial Judge deviated from the true measure of compensation—fair market value of the leasehold, if any, over and above the rental charge—and admitted testimony as to anticipated profits, and informed the jury that they could take into considera-

tion such profits for the purpose of determining the value of the unexpired lease.

“The fair market value of the unexpired portion of appellee’s lease in excess, if any, of the rental charged, must be ascertained. * * * ”

Incidentally, in this case the Circuit Court held that it would have been more appropriate if both the claims of the lessor and lessee had been adjudicated in the same trial. In other words, the Circuit Court there approved the procedure adopted in the case at bar and said that the lower Court should likewise have determined whether or not the lease had been cancelled by action of the parties. In this connection the Circuit Court said:

“If the lease was cancelled by appellees [lessees], no recovery ought to be had by them, or, if the lease was merely suspended because of the pendency of the condemnation proceedings, any damages to Appellees must be diminished by the annual rent which they were relieved from paying, if any.”

Again we submit the cases just cited conclusively establish the error of the trial court in admitting evidence of past and prospective profits. This is true whether those profits are the direct basis of the award or whether the evidence is submitted in an attempt to recover value taking into account those prospective profits as counsel for Lebenbaum contended when urging the admission of the evidence. We submit that the cases above cited support each and every one of the grounds of Specifications of Error 4, c, d, e, f, g, and h; 11, 12, 13, 14 and 15.

The Court Misinterpreted the Stipulation for Restoration.

As heretofore stated during the course of the trial between Gawzners and Lebenbaum the parties stipulated as follows:

“It is stipulated that the portion of the award made by the Judgment of November 26, 1946, in the within cause, that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of \$91,296” [R. 356]

and it was further stipulated that said sum would restore the premises to their condition as of July 10, 1944, including all items of ordinary wear and tear that occurred during the Government's occupancy as well as all items of restoration for damage done during the Government's possession in excess of ordinary wear and tear [R. 435]. This is the only evidence in the record in reference to such restoration except the details of the amount making up said sum of \$91,296 [R. 358-362]. In spite of these facts the Court found [Finding 22 R. 231] that the sum of \$113,704 (the sum remaining after deducting the amount of \$91,296) did not represent the compensation paid for the use of the premises for the reason that the total sum of \$205,000 had been depleted by the amount for restoration to an extent greater than that contemplated by the Stipulation for Judgment for the sum of \$205,000. In that same Finding the Court admits that there is no evidence by which he can find the amount of such depletion. We respectfully submit that there was no evidence that the sum of \$91,296 was not the actual amount necessary for such restoration to place the premises in the condition at the date of the taking by the government. It will be recalled that under the terms of the lease Leben-

baum was required to maintain the premises in the condition in which they were at the time he leased the same [Paragraph Seven of the Lease, R. 287-288].

We submit that the Court erred in holding in Finding 17 [R. 227] that there was no evidence as to whether or not a portion of the fund remaining for division after the allocation of \$91,296 for restoration was to include compensation for the time necessary for restoration; and that the Court erred in holding in Finding 18 [R. 228] that there was no evidence whereby the Court could make a finding as to excess wear and tear or excess costs of restoration; and that the Court erred in holding in Finding 19 [R. 228] that no evidence was introduced as to the portion of the funds allocated to restoration which were properly chargeable to Gawzners or Lebenbaum. The Stipulation of the Parties as to the disposition of the restoration fund, i.e., the sum of \$91,296, after providing that \$10,500 should be paid to Lebenbaum and \$80,796 be paid to Gawzners subsequently provides [R. 100 and 101] that upon the payment of those funds out of the Registry of the Court both Lebenbaum and Gawzners

“shall waive any further contentions in the above entitled action in reference to said sum of \$91,296 allocated to the restoration, repair and replacement of the property condemned, both real and personal, * * *. Upon the payment of the funds out of the Registry of the Court to the parties hereto, as provided by this stipulation, this stipulation shall be conclusive between the parties hereto as to their rights to that portion of the award made in the above entitled action allocated pursuant to stipulation of

the parties hereto to the restoration, repair and replacement of the property condemned in said action, both real and personal, to wit, to that portion of the award in the sum of \$91,296 * * *.”

It is submitted that the Court in making the Findings above set forth misinterpreted the plain language of that stipulation and that there is no testimony in the record to support such findings.

It is submitted that the Court erred in holding in Finding 19 [R. 229] that as to some items restoration was made to an extent beyond that necessary to restore the same to the condition as of the beginning of the lease and, therefore, not properly chargeable to restoration or damage caused by the United States. There is no evidence to support such Finding. The Finding is contrary to the express stipulation of the parties determining that the sum of \$91,296 was the proper amount to be allocated to restoration.

The Court erred in holding in Finding 19 [R. 230] that there was no evidence from which the Court could make a finding as to what portion of the fund was used or should have been used to restore the premises not covered by the lease. It is respectfully contended that this finding is in the face of the stipulation of the parties in reference to the distribution of the restoration fund whereby the same was to be conclusive on the parties.

The foregoing points are set forth in Specifications of Error 5, 6, 7, 8, 9 and 10.

The Court Erred in Refusing Gawzners Permission to File Paragraphs IV, V, XX and XXI of their Cross-Complaint and Exhibit B Attached Thereto.

It is conceded that if this Court awards the entire compensation to Gawzners under the contentions heretofore advanced, then the error here complained of would be moot. However, if the cause is remanded for a retrial, it is respectfully submitted that the error here complained of would be material and that the issues set forth in said Paragraphs IV, V, XX, and XXI of the Cross-Complaint [R. 78 and 79] should be tried in such proceeding and that the parties should not be relegated to some other tribunal to determine these issues. That it is proper to determine whether or not the lease has been cancelled by events occurring subsequent to the return of possession of the premises by the United States has been established by the case of *Galvin v. Southern Hotel Corporation, supra*. In that action the Court held that it was proper for the District Court to declare a cancellation of the lease for failure of the tenant to comply with the covenants of the lease, subsequent to the return of possession of the premises by the United States.

Conclusion.

We respectfully submit that this Court should upon the record before it reverse the Judgment of the District Court and direct that Court to enter Judgment cancelling the lease and for defendants Paul Gawzner and Irene Gawzner for the entire amount remaining on deposit in the Registry

of the Court, namely, the sum of \$110,437.75 (being the remainder of the award of \$113,704 less the sum of \$1594.02 withdrawn from the Registry by the defendants Gawzners and less the sum of \$1672.23 paid Lebenbaum directly by the United States) and directing the Clerk to pay the same to them. The record before this Court would authorize such procedure, first, upon the provisions of the Condemnation clause of the lease and, second, upon the tacitly conceded point that without a consideration of profits Lebenbaum could claim no market or bonus value to the lease in question.

Respectfully submitted,

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No. 12299.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAUL GAWZNER and IRENE GAWZNER,

Appellants,

vs.

LEO LEBENBAUM,

Appellee.

LEO LEBENBAUM,

Appellant,

vs.

PAUL GAWZNER and IRENE GAWZNER,

Appellees.

OPENING BRIEF OF APPELLANT LEO
LEBENBAUM.

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TOPICAL INDEX

| | PAGE |
|---------------------------------|------|
| Opinion below | 1 |
| Jurisdiction | 2 |
| Statutes involved | 3 |
| Succinct statement of case..... | 3 |
| Extended statement | 5 |
| Questions presented | 12 |
| Summary of argument..... | 14 |
| Argument | 22 |

I.

| | |
|--|----|
| The trial court erred in not awarding Lebenbaum all of the rental awarded for the taking of the leased area..... | 22 |
|--|----|

II.

| | |
|---|----|
| The trial court erred in not finding and decreeing that the parties had abandoned the measure of damages fixed by the Fifth Amendment and had permanently fixed the sum of \$113,704 then remaining in the registry as the agreed rental to be paid by the Government for the compensation, other than for restoration, for its taking of the leased and unleased areas | 42 |
|---|----|

III.

| | |
|--|----|
| The trial court erred in failing to separately find and decree the sum due appellants Gawzner for the Government's obligation to them for the rental of the unleased area..... | 45 |
|--|----|

IV.

| | |
|---|----|
| The court erred in denying Lebenbaum's motion to exclude appellants Gawzner from participation in the trial except as to the fixing of the value of the use and occupancy of the unleased area..... | 46 |
|---|----|

V.

The court erred in refusing to find and decree that its jurisdiction was limited to determining..... 49

VI.

The court erred in refusing to find and decree that it was without jurisdiction to try and determine the contract rights of appellants Gawzner, against appellant Lebenbaum, to collect rents under the lease during the plaintiff's occupancy of the leased premises, or to enforce payment thereof..... 49

VII.

If the court had jurisdiction to determine and enforce payment of the rental due from Lebenbaum to Gawzners under the lease, during the period of plaintiff's occupancy of the leased premises, it should have found and decreed that such rental was the minimum guarantee of \$1500 per month as provided in paragraph three of the lease..... 55

VIII.

The court erred in overruling Lebenbaum's objections to, and denying his motions to strike the answers of the witnesses Allen and Frisbie as to the bonus value of Lebenbaum's leasehold estate..... 56

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|---|----------------------------|
| Albrecht v. United States, 91 L. Ed. 532, 329 U. S. 599..... | |
| | 9, 43, 51, 52 |
| Bader v. Coale, 48 Cal. App. 2d 276, 119 P. 2d 763..... | 26 |
| California v. United States, 169 F. 2d 914..... | 24 |
| Cherokee Nation v. Southern Kans. R. R. Co., 135 U. S. 641, 34 L. Ed. 295..... | 50 |
| Conover v. Smith, 83 Cal. App. 227, 256 Pac. 835..... | 31 |
| Danforth v. United States, 308 U. S. 271, 84 L. Ed. 240..... | 43 |
| Duckett v. United States, 266 U. S. 148, 69 L. Ed. 216..... | 34, 37 |
| Eagle Lake Imp. Co. v. United States, 160 F. 2d 182..... | 51 |
| Erickson v. Rhee, 181 Cal. 562, 185 Pac. 847..... | 38 |
| Fargo v. Browning, 61 N. Y. Supp. 301..... | 47 |
| Gluck v. Baltimore, 81 Md. 315, 32 Atl. 515..... | 34, 41 |
| Gruber v. Pacific States Sav. & Loan Co., 13 Cal. 2d 144, 88 P. 2d 137 | 39 |
| Hitchcock v. Hassett, 71 Cal. 331, 12 Pac. 228..... | 39 |
| John Hancock Mut. Life Ins. Co. v. United States, 155 F. 2d 977 | 41, 56 |
| Keating v. Preston, 42 Cal. App. 2d 110, 108 P. 2d 479..... | 24 |
| Leonard v. Auto Car Sales & Service Co., 392 Ill. 182, 64 N. E. 2d 477..... | 34, 36, 37, 40, 47 |
| Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P. 2d 785 | 24 |
| Lowe v. Ruhlman, 67 Cal. App. 2d 828, 155 P. 2d 671..... | 24 |
| Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. Ed. 463 | 50 |
| New York Telephone Co. v. United States, 136 F. 2d 87..... | 48, 52 |
| Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526..... | |
| | 34, 35, 41, 50, 51, 52, 55 |
| Reidman v. Barkwill, 139 Cal. App. 564, 34 P. 2d 744..... | 32 |

| | PAGE |
|--|----------------|
| San Joaquin, etc. v. Stevinson, 164 Cal. 221, 128 Pac. 924..... | 48, 50, 51, 52 |
| Stratford v. Continental Mtge. Co., 74 Cal. App. 551, 241 Pac. 429 | 24, 32 |
| Swanson v. United States, 156 F. 2d 442..... | 53 |
| United States v. Alderson, 53 Fed. Supp. 528..... | 27 |
| United States v. Certain Land in Annapolis, Md., 46 Fed. Supp. 441 | 53 |
| United States v. General Motors, 323 U. S. 373, 89 L. Ed. 311 | 37, 38, 56 |
| United States v. Lands, 53 Fed. Supp. 884..... | 9, 44, 51 |
| United States v. Land in Mariposa County, Calif., 77 Fed. Supp. 798 | 44 |
| United States v. Petty Motor Co., 327 U. S. 372, 90 L. Ed. 729 | 56 |
| United States v. 21 Acres of Land, 61 Fed. Supp. 268..... | 23, 35, 40 |
| United States v. 150.29 Acres of Land, 148 F. 2d 33..... | 25 |
| Wachovia Bank v. United States, 98 F. 2d 609..... | 43 |
| Walther v. Sierra Ry. Co., 141 Cal. 288, 74 Pac. 840..... | 35 |
| Webb v. Jones, 88 Cal. App. 20, 263 Pac. 538..... | 39 |

STATUTES

| | |
|---|----|
| Act of August 18, 1890 (26 Stat. 315)..... | 3 |
| Act of August 18, 1890 (26 Stat. 316)..... | 2 |
| Act of July 2, 1917 (40 Stat. 241)..... | 2 |
| Act of April 11, 1918 (40 Stat. 518; 50 U. S. C., Sec. 171)..... | 2 |
| Act of March 27, 1942 (56 Stat. 176)..... | 2 |
| Civil Code, Sec. 1442..... | 24 |
| Civil Code, Sec. 1648..... | 30 |
| Civil Code, Sec. 3275..... | 31 |
| Military Appropriation Act (Act of June 28, 1944) (58 Stat. 573) | 3 |

| | PAGE |
|--|--------------|
| Second War Powers Act (56 Stat. 176; 50 U. S. C., App., Sec. 632) | 3 |
| United States Code, Title 28, Sec. 1291..... | 2 |
| United States Code, Title 40, Sec. 258a..... | 53 |
| United States Constitution, Fifth Amendment..... | 3, 9, 12, 21 |

TEXTBOOKS

| | |
|--|--------|
| 32 American Jurisprudence, Sec. 76, pp. 89-90..... | 35 |
| 32 American Jurisprudence, Sec. 195, p. 185..... | 35 |
| 15 California Jurisprudence, Sec. 19, pp. 614-615..... | 35 |
| 15 California Jurisprudence, Sec. 76, p. 667..... | 35 |
| 15 California Jurisprudence, Sec. 137, p. 726..... | 39 |
| 29 Corpus Juris Secundum, Sec. 198, p. 1106..... | 39, 46 |
| Macmillan's Modern Dictionary (1938 Ed.)..... | 29 |
| Webster's Encyclopedic Dictionary (1948 Ed.)..... | 29 |

INDEX TO APPENDICES

| | PAGE |
|--|------|
| Appendix I | 3 |
| Excerpts from the Fifth Amendment to the Federal Consti- tution | 1 |
| Excerpts from the Act of August 18, 1890 (26 Stat. 315) as amended | 1 |
| Excerpts from the Second War Powers Act (56 Stat. 176; 50 U. S. C. Appendix, Sec. 632)..... | 1 |
| Appendix II. Excerpts from Streets and Highways Statutes.... | 3 |
| Appendix III. Excerpts from Reporter's Transcript..... | 5 |

No. 12299.

IN THE

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Appellees.

OPENING BRIEF OF APPELLANT LEO
LEBENBAUM.

Opinion Below.

There are three opinions by the District Court. The first was by the late Judge Harry A. Hollzer, dated June 30, 1945, in which he held, on pre-trial, that the taking of a portion of appellant, Lebenbaum's lease did not terminate the lease, or said appellant's right to compensation for such taking, under paragraph Ten of said lease. This opinion is reported in 61 Fed. Supp. 268. The second was by Judge Jacob Weinberger [R. 13] and is unreported. The third is likewise by Judge Weinberger [R. 105] and

is unreported. The findings of fact and conclusions of law appear in the record at pages 214-236.

Jurisdiction.

This suit was originally brought by the United States of America under the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by the Act of Congress approved July 2, 1917 (40 Stat. 241), as amended by the Act of Congress approved April 11, 1918 (40 Stat. 518; 50 U. S. C., Sec. 171), as amended by the Act of Congress approved March 27, 1942 (56 Stat. 176), commonly known as the Second War Powers Act. Jurisdiction was thereby vested in the District Court to fix and determine what interests were taken, from whom they were taken, the amount of the just compensation to be paid for such taking and to whom such compensation should be paid.

For the reasons stated in the Argument, *infra*, pp. 49-55, it is believed that the District Court had *no* jurisdiction to *adjust equities* between appellant Lebenbaum and appellants Gawzner, or to determine their rights and liabilities *inter se* under the lease or to fix and award rent under the lease to Gawznerns, where no portion of Gawznerns' rights in such lease were taken by plaintiff and only Lebenbaum's rights were taken.

The judgment from which this appeal was taken was entered April 15, 1949 [R. 237]; appellant's Notice of Appeal was filed May 16, 1949 [May 15, 1949 being a Sunday; R. 247]. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1291.

Statutes Involved.

The Act of August 18, 1890 (26 Stat. 315) as amended.

The Second War Powers Act (56 Stat. 176; 50 U. S. C. Appendix, Sec. 632).

The Military Appropriation Act. approved June 28, 1944 (58 Stat. 573).

The Fifth Amendment to the Federal Constitution.

Pertinent excerpts from each appear in *Appendix i*.

Succinct Statement of Case.

This is a succinct statement of the case without transcript reference. Transcript references are contained in the extended statement which follows:

The United States condemned the temporary occupancy and use of approximately 21 acres of land in Santa Barbara, California, the major portion of which was under a lease for hotel purposes from appellants Gawzner to appellant Lebenbaum, and a small portion of which was outside the leased area. The Government took a term of $22\frac{2}{3}$ months, commencing on July 10, 1944 and ending July 1, 1946.

At the date of the taking Lebenbaum's lease ran until December 31, 1948, and he had an option for a 5-year renewal, so that, as to the leased area, the Government was a "short term occupier of a portion of a long term lease." Possession of both portions of the property was taken under the Second War Powers Act and *without* Court order. There was *no Declaration of Taking* but, with the consent of appellants, the Government made a number of deposits of estimated compensation into the registry of the Court. At the date when possession was

taken Lebenbaum was in possession of the leased area and Gawzners were in possession of the unleased areas.

The Government and all three appellants stipulated in writing, fixing the total obligation of the Government, for rent and for restoration, in the sum of \$205,000 and pursuant thereto a judgment was entered for said sum and which provided that such sum was the just compensation to be paid by the Government and that if called and sworn, competent witnesses would so testify. The Government deposited the deficiency over and above its previous deposits and the appellants filed satisfactions as to it. Thereafter, and prior to the entry of the judgment which is here appealed from, all three appellants, by stipulation, fixed the amount of the compensation for restoration and repair in the sum of \$91,296 and, pursuant to the stipulation, the Court caused said sum to be disbursed to them out of the sums in the registry. This left the sum of \$113,704 as the *agreed compensation for rental* for the leased and unleased areas.

Gawzners claimed this *entire* sum upon the ground that the lease was terminated by this suit and their notice to Lebenbaum under paragraph Ten of the lease. Lebenbaum claimed *all* of this sum, *excepting* such amount as should be fixed and allowed as *rental* for the use and occupancy of the *unleased area* for such period of $22\frac{2}{3}$ months. The Court rejected both claims, held that paragraph Ten of the lease did not apply to this suit and that the lease *remained effective for all purposes*, but further held that it had jurisdiction *to do equity as between the parties* and that equity would require a consideration of what each party might have obtained under the lease had the Government not condemned temporary occupancy of it. He, therefore, proceeded to hear evidence as to the market rental value of the unleased area and as to what

the parties might have obtained by way of income under the lease if the Government had not seized a portion thereof and, upon such basis, refused to separately fix and determine the portion of the award which represented rental to Gawzners for the use and occupancy of the unleased area and allocated the remaining funds in the registry on a basis of approximately 52% to Gawzners and 48% to Lebenbaum. All defendants have appealed.

Extended Statement.

This case originated as an eminent domain taking under the Second War Powers Act of an estate in certain real and personal property located in the City of Santa Barbara, California, for a term of years beginning July 10, 1944 and ending June 30, 1945, and extendable for yearly periods thereafter, during the existing national emergency, at the Government's election. The property taken consisted of lands and improvements owned in fee by appellants Gawzners, the major portion of which was improved and being operated as a hotel known as the "Mirmar Hotel." This major portion had been leased in writing [R. 275] by appellants Gawzner to appellant Lebenbaum for a term of years beginning December 15, 1943, and ending December 31, 1948. Possession was taken of this portion of the premises without Court order under the authorization contained in the Second War Powers Act [R. 261] and from appellant, Lebenbaum, who was then in actual possession thereof under said lease [R. 5, 15] and was then actively engaged in managing and operating the hotel after having advanced and expended some \$20,000 to rehabilitate, redecorate and refurnish the premises [F. 12; R. 226]. This will hereafter be called the *leased area*.

The portions taken which were not included in the Lebenbaum lease were taken without Court order from appellants Gawzners. Both Gawzner and his wife and Lebenbaum were named in the original complaint and all subsequent amendments, as apparent owners of, or claimants to, some interest in the property taken [F. 2; R. 216]. This will hereafter be called the *unleased area*.

The Gawzners filed an answer to the complaint alleging sole ownership, admitting that Lebenbaum *had* a lease covering the leased area but alleging that under paragraph Ten of the lease [R. 291] and pursuant to a 30-day written notice served by them upon Lebenbaum [R. 305], such leasehold rights had terminated and claiming the *total compensation* for the taking [R. 72].

Lebenbaum filed an answer to the complaint, alleging the existence of the lease from the Gawzners, that the lease was in effect and he, Lebenbaum, was in possession at the date the Government took possession of the leased premises, that the lease had not been terminated and that he, alone, was entitled to the *full compensation* for the taking of the leased area [R. 87; 263, par. 12].

While the record was in such stage, the Government elected to extend its term to June 30, 1946 [R. 262, par. 6].

A pre-trial hearing was had before the late District Judge Harry A. Hollzer, as to the issue thus presented and he rendered a decision which is reported in 61 Fed. Supp. 268. He held that paragraph Ten of the lease was not intended to apply to this type of condemnation proceeding and that the lease remained in effect with Lebenbaum bound to the Gawzners as if no taking had occurred and that the compensation for the leased area was payable to Lebenbaum [R. 114].

Shortly thereafter Judge Hollzer died, the Government amended its Complaint and the cause was transferred to Judge Weinberger. In pleadings to the amended complaint the appellants Gawzners and appellant Lebenbaum raised the same issues, each claiming *all* of the compensation for the leased area and Lebenbaum filed a motion to exclude the Gawzners from participation in the fixing of compensation for such area [R. 6] and a motion that the Government be directed to return possession thereof to him [R. 4]. The Gawzners opposed both motions [R. 9, 262]. This resulted in a new pre-trial hearing and Judge Weinberger filed a written memo of his conclusions on April 30, 1946 [R. 13]. He agreed with Judge Hollzer that the lease had not been terminated but remained in full force and effect [R. 16]. He then ordered the premises covered by the lease returned by the United States to the possession of Lebenbaum [R. 16] and denied the Lebenbaum motion to exclude the Gawzners [R. 17].

The United States entered into a separate stipulation with Lebenbaum as to surrender of possession of the portion taken covered by this lease [R. 20] and he accepted and receipted for possession on June 17, 1946 [R. 28]. The Government entered into a separate stipulation with the Gawzners as to redelivery of possession of the portion taken which was not in the Lebenbaum lease [R. 23] and they receipted for possession thereof on July 10, 1946 [R. 35].

On October 23, 1946, the Government filed its Third Amended Complaint which fixed the total term of its taking as commencing on July 10, 1944 and ending June 1, 1946 [R. 36]. Lebenbaum had filed an answer to the Government's Second Amended Complaint on November 6, 1945 [R. 87] and it was stipulated that it would serve

as answer to the Third Amended Complaint [R. 263, par. 12].

The Gawzners filed an answer to the Third Amended Complaint [R. 72].

During the course of the proceedings and upon its application and the stipulation of appellants Gawzners and Lebenbaum, the United States had made three deposits into the registry of the Court totaling \$73,693.55 [R. 264].

On April 18, 1945, the sum of \$1,594.02 was paid to the Gawzners (for taxes) to be credited upon any award received by them [R. 264].

On November 26, 1946, the Government and all of the appellants stipulated as to the compensation to be paid by the Government [R. 45] and a judgment was entered pursuant thereto [R. 53]. Following this the Government paid the balance of the adjudged compensation into Court [R. 265] and thereby became eliminated from this cause [R. 410].

Said stipulation [R. 45] and judgment [R. 53] each provided:

(b) That the sum of \$205,000, without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in subparagraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and

personal property so taken by it to the same condition as it was when it was received by the plaintiff from the defendants, reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration;

It is the contention of appellant Lebenbaum that the parties (Lebenbaum and Gawzners) thereby departed from the rule of just compensation fixed by the Fifth Amendment and fixed the compensation by contract; that they are bound thereby and the measure of the Fifth Amendment no longer governs this case. (*Albrecht v. U. S.*, 91 L. Ed. 532, 538, 329 U. S. 599, 603; *United States v. Lands*, 53 Fed. Supp. 884, 885.)

Following further arguments and a partial trial, appellants Lebenbaum and Gawzners entered into a stipulation [R. 98] fixing the amount of the agreed award to be allotted to each of them as the portion of the award covering restoration damages and payment was ordered and made in accordance therewith [R. 103].

It is the contention of appellant Lebenbaum that the moneys remaining in the registry represented the rental for unleased area and for the leased area. That having held that the lease remained in full force and effect and that he, Lebenbaum, continued liable to the Gawzners for rent under his lease, the trial court was required to fix as an award to the Gawzners that portion of the agreed rent for the unleased area and to award the balance in the registry to Lebenbaum as the agreed rental for the leased area. That the trial court had no general, equitable or legal jurisdiction which was invoked by these proceedings, to adjudge and enforce payment of rental to Gawzners by Lebenbaum *under the lease*, or to disburse such contract

rental out of that portion of the fund remaining in the registry which represented the agreed rental value of the leased area and that this was particularly true where Gawzners had no interest in or lien upon such agreed rental for the leased area and they had continuously refused to accept or receive rent from him [R. 226]. Appellant Lebenbaum also contends that, if the trial court did have jurisdiction to adjudge and enforce payment of rental from Lebenbaum to Gawzners (under the lease) and out of the fund on deposit, paragraph Three of the lease required the Court to fix the rental in the guaranteed minimum of \$1500 per month.

The trial court overruled these contentions of appellant Lebenbaum and held that, since both parties had appeared and invoked its jurisdiction by claiming to be entitled to the compensation, it could retain and that it had retained, jurisdiction to adjust and enforce the equities and legal rights of the parties under the lease and it proceeded to do so.

In the ensuing trial testimony was offered by Gawzners through witnesses Allen and Frisbie that the *leased* portion had no bonus value [R. 377, 393] and the motion of appellant Lebenbaum to strike such testimony was denied [R. 187]. Appellant Lebenbaum contends that such evidence was incompetent, irrelevant and immaterial and that the refusal to strike it was prejudicial error because the parties *by their agreement*, had fixed the compensation and no other measures could thereafter be applied by the Court.

Because the trial court had ruled against his contention that the agreement controlled, appellant Lebenbaum introduced evidence as to the actual and expected income from the operation of the leased property [R. 425-448] and the

Court adduced evidence from the witness Frisbie that the market rental value of 22 $\frac{2}{3}$ months' use and occupancy of the leased area was \$161,500 [R. 400]. The witness Allen [R. 382] and the witness Frisbie [R. 395] each testified that the market rental value of the lands not included in Lebenbaum's lease, for the term taken, was \$10,950.*

By stipulation appellants had fixed the total compensation, including restoration and rental, at \$205,000 [R. 45, 53] and had agreed upon \$91,296 as restoration [R. 98, 103], leaving \$113,704 to be distributed as rent. Thus, the evidence had disclosed that the market rental value of the leased and unleased areas, together with the stipulated restoration, amounted to the total of \$161,500 plus \$10,950, plus \$91,296, or a total of \$263,746, whereas the agreed compensation paid by the Government was \$205,000, or approximately 77.7% of the market rental value and restoration damage.

The trial court, therefore, apparently scaled down the \$10,950 to 77.7% thereof or \$8,508 which, when deducted, left \$105,196 as the ratably reduced rent for the leased area. He next determined from the testimony of witness Pettegrew [R. 175] that the distribution of prospective earnings would have been 52% to the owners (Gawzners) and 48% to the tenant (Lebenbaum) and, assuming he had jurisdiction to do so, divided the remainder of \$105,196 in approximate percentages of 58% to the owner and

*The trial court found that such amount was \$10,500. This was based on testimony of Allen. However, Frisbie subsequently testified that an error had been made in the area of the unleased portion and, after correcting the area, testified that the market rental value thereof was \$10,950. It was then stipulated that Allen's testimony should be corrected to the same amount. However, the trial court failed to note the stipulation in arriving at his finding [R. 162, fols. 23 and 24; R. 232].

42% to the lessee, to-wit Gawzners \$60,836, Lebenbaum \$44,360.

It is not clear just how he arrived at these percentages unless, by inadvertence, he transposed the percentage figures.

Lebenbaum asserts that the trial court had no jurisdiction to fix the rent to be paid by Lebenbaum to Gawzners *under the lease* nor to order it paid from this compensation. That such equitable or legal adjustments and decrees as to the rights of the appellants *inter se* and not connected with any interest in the award paid by the Government were exclusively within the jurisdiction of the State Court and beyond the jurisdiction of the trial court, since all appellants were California citizens [R. 276].

Questions Presented.

The questions presented on this appeal are contained in Lebenbaum's Statement of Points which are set forth in the printed transcript [R. 273-275]. Appellant will here-with restate them succinctly:

1. Did the trial court err in failing to award appellant Lebenbaum all of the agreed rental for the taking of the leased area?
2. Did the trial court err in failing to find that the appellants, by contracts (*i. e.*, stipulations) waived the measure of compensation fixed by the Fifth Amendment and substituted \$113,704 as their agreed rent for the taking of the use and occupancy of the leased and unleased areas?
3. Did the trial court err in failing to fix and decree the rental separately due Gawzners for the taking of the use and occupancy of the unleased area?

4. Did the trial court err in denying Lebenbaum's Motion to exclude appellants Gawzner from participating in the fixing of the compensation for the leased area?
5. Did the trial court err in refusing to limit the trial and its judgment to the fixing of the compensation for the taking of the use and occupancy of the leased and unleased areas separately, the determination of the persons entitled to such awards and the making of such awards?
6. Did the trial court err in assuming to itself jurisdiction to determine the rights and liabilities as between the appellants under the lease and ordering payment of the equivalent of rental under the lease out of the agreed award for the use and occupancy of a portion of the term of the lease?
7. If the Court had jurisdiction to determine and enforce payment of the rental due from Lebenbaum to Gawzners *under the lease* for the period of the plaintiff's occupancy of the leased premises, did the Court err in not finding and decreeing that such rental was the minimum guarantee of \$1500 per month as provided in paragraph Three of the lease?
8. Did the Court err in overruling Lebenbaum's objection to, and refusing his motion to strike the answer of the witness Edward H. Allen as to the bonus value of Lebenbaum's lease?
9. Did the Court err in overruling Lebenbaum's objection to, and refusing his motion to strike the answer of the witness Charles G. Frisbie as to the bonus value of Lebenbaum's lease?

SUMMARY OF ARGUMENT.

1. The Trial Court Erred in Not Awarding Lebenbaum All of the Rental Awarded for the Taking of the Leased Area.

This is a more succinct repetition of Point 1 in his statement [R. 273]. The Lebenbaum lease was not terminated by this condemnation proceeding, nor by the Notice dated August 4, 1944. And the Court erred in not awarding Lebenbaum all of the agreed rental for the leased area. The trial court concluded that the lease was not terminated [C. 2; R. 234-235]. The Judgment appealed from [R. 238] so determined by implication by failing to award the *whole* compensation to the Gawzners.

Such portion of the Judgment is favorable to appellant, Lebenbaum, and, as we shall show, is correct upon the facts disclosed by the record and is supported by the applicable law. Lebenbaum *does not* appeal therefrom but asks affirmance by this Court.

Lebenbaum's claim of error is that the trial court did not *follow through* and award the total compensation for the rental of the leased area to him because:

- (a) He, alone, is the one from whom possession was taken;
- (b) Gawzners had no right to possession and none could be taken from them;
- (c) They had no right in or lien upon such portion of the Government's obligation arising out of such taking, and
- (d) The fund then remaining in the registry of the Court was the agreed monetary value of the Government's such obligation for rental.

2. The Trial Court Erred in Not Finding and Decreeing That the Parties Had Abandoned the Measure of Damages Fixed by the Fifth Amendment and Had Permanently Fixed the Sum of \$113,704 Then Remaining in the Registry as the Agreed Rental to Be Paid by the Government for the Compensation, Other Than for Restoration, for Its Taking of the Leased and Unleased Areas.

This is a restatement of Lebenbaum's Point 3 [R. 274]. By Stipulation [R. 45] approved by the Court and incorporated into a Judgment [R. 53], the appellants agreed that all compensation to be paid by the Government was the sum of \$205,000, plus certain improvements which the Government had made and would relinquish to the fee owners; that such sum and relinquished property was "fair, just and adequate compensation" [R. 47, 55] for the Government's obligation for *rent* and for *restoration* and that such would be the testimony of competent witnesses [R. 49]. Such stipulation and judgment covered both the leased and unleased areas and did not segregate the award as between them.

By subsequent stipulation [R. 98] approved by the trial court and incorporated into an Order [R. 103], the *restoration* portion of the Government's obligation was fixed at \$91,296 and such sum was distributed between the appellants in accordance with their stipulation and there was left in the registry, at the date of the judgment appealed from, the sum of \$113,704 [F. 21; R. 231].

Appellant, Lebenbaum, contends:

- (a) The parties had the right to fix compensation by agreement;
 - (b) When so fixed it became binding in lieu of and supplanted the measure fixed by the Fifth Amendment;
 - (c) Rental and restoration constituted the full liability of the Government, and
 - (d) When restoration was fixed and paid by agreement, the remaining sum of \$113,704 represented *agreed rental* for the leased and unleased areas.
3. **The Trial Court Erred in Failing to Separately Find and Decree the Sum Due Appellants Gawzner for the Government's Obligation to Them for the Rental of the Unleased Area.**

This is a restatement of Lebenbaum's Point 2 [R. 273-274]. The Government took a $22\frac{2}{3}$ months' use and occupancy of two portions of improved and unimproved lands. That which we have called and will term the "leased area" was owned in part by Gawznors and in part by Lebenbaum. Lebenbaum had the exclusive right of possession as a lessee in possession for a term *beyond the term taken by the Government*—an estate known as a leasehold estate. It, and all rights and obligations *inter se* as fixed by the contract, remained in full force and effect. Lebenbaum's right of possession and use was taken. Gawznors had the reversion and the right to collect the contract rental from Lebenbaum, neither of which was taken. They had no right to the occupancy or use of the leased area which was all that was taken and they had no lien upon the award to secure their rental.

Lebenbaum, therefore, was the one whose interest was taken and was entitled to receive all of the rental which the Government was obligated to pay for the use and occupancy of his leasehold and Gawzners were entitled to receive only the rental which the Government was obligated to pay for the use and occupancy of the unleased area.

The \$113,704 remaining in the registry and which the Court was called upon to distribute by the decree which has been appealed from, represented *both* rents and it became necessary for the Court to *fix* both. This the Court failed to do and instead assumed a purported jurisdiction in equity and further purported to fix the rights and obligations as between appellants under the contract provisions of the lease and to make equitable distribution accordingly.

4. The Court Erred in Denying Lebenbaum's Motion to Exclude Appellants Gawzner From Participation in the Trial Except as to the Fixing of the Value of the Use and Occupancy of the Unleased Area [R. 6, 16; 262, par. 9].

This is a restatement of Lebenbaum's Point 4 [R. 274]. The Court determined that the lease was still effective [R. 16]. This, by operation of law, eliminated any right of Gawzners in the compensation for the use and occupancy of the leased area. The Court should have restricted Gawzners' participation to the fixing of the compensation to be paid by the Government for the unleased area.

5. **The Court Erred in Refusing to Find and Decree That Its Jurisdiction Was Limited to Determining—**
- (a) what interests the plaintiff had taken;
 - (b) from whom they were taken;
 - (c) what the appellants had fixed and agreed to be the compensation for such taking, after they had deducted and received their fixed and agreed compensation for restoration;
 - (d) who was entitled to such compensation [R. 274].
6. **The Court Erred in Refusing to Find and Decree That It Was Without Jurisdiction to Try and Determine the Contract Rights of Appellants Gawzner, Against Appellants Lebenbaum, to Collect Rents Under the Lease During the Plaintiff's Occupancy of the Leased Premises, or to Enforce Payment Thereof [R. 274].**

We state Lebenbaum's Points 5 and 6 together because they may properly be considered together as variants of the same error. This error was raised repeatedly and continuously by Lebenbaum:

- (a) by motions to exclude Gawzners from participating in the trial in so far as the leased area was concerned [R. 114, 119, 123, 148], and
- (b) by objections to the proceedings when the Court insisted upon evidence to support a basis for adjusting the cause "equitably" and allocated to each, *i. e.*, Gawzners and Lebenbaum, what he determined each might have derived *from operations under the lease* had the Government not condemned it [R. 149, 184-185 and Appendix ii].

We believe the error of the Court is demonstrated by the following established principles:

- (a) This is a special proceeding in the nature of an action at law;
- (b) It is not an equity case;
- (c) It is not a proceeding *in personam*;
- (d) But is a proceeding *in rem*;
- (e) The fund remaining on deposit represented the rental for the rights taken and was *all* that was left for distribution and the full measure of the Court's jurisdiction;
- (f) This was the agreed rental value in lieu of the constitutional market rental value;
- (g) The only jurisdiction which had been invoked was under the eminent domain statute;
- (h) The appellants (defendants) and the trial court were limited as to the remedies and jurisdiction, to the remedies which the appellants had against the Government as condemnor, and
- (i) There was no federal jurisdiction here invoked and available to the Court and the appellants as to the matters not affecting appellants' rights against the Government as condemnor such as controversies *in personam inter se* because there was no diversity of citizenship.

7. If the Court Had Jurisdiction to Determine and Enforce Payment of the Rental Due From Lebenbaum to Gawzners Under the Lease, During the Period of Plaintiff's Occupancy of the Leased Premises, It Should Have Found and Decreed That Such Rental Was the Minimum Guarantee of \$1500 Per Month as Provided in Paragraph Three of the Lease [R. 275].

Assuming, solely for the purpose of this Point, that the trial court had jurisdiction to fix the rental *under the lease* which Gawzners would have received during the Government's $22\frac{2}{3}$ months' occupancy of the leased area and to direct that such sum be distributed from the remaining deposit in the registry, the lease, itself, fixed an *alternative* rental which the Court should have applied. Paragraph Three [R. 281-285] makes specific provision for the possibility that the lessors' contract percentage of the lessee's earnings *from operations* might be *less* than the guaranteed rent of \$1500 per month [R. 282-283]. There is no provision therein for default or eviction should the lessee fail to earn enough to produce a lessors' contract percentage in excess of the minimum rental. Certainly there was none where such result is involuntary on the part of the lessee. Clearly, then, the *alternative guaranteed* rental of \$1500 per month would be the maximum which the Court could have legally applied.

8. The Court Erred in Overruling Lebenbaum's Objections to and Denying His Motions to Strike the Answers of the Witnesses Allen and Frisbie as to the Bonus Value of Lebenbaum's Leasehold Estate.

This is a restatement of Lebenbaum's Points 8 and 9. We state them together because they cover the same error.

In view of the fact that the appellants, by stipulation, had fixed the compensation in an agreed amount as the agreed award for rental of the leased and unleased areas, the question as to what might or might not have been the bonus value measure under the Fifth Amendment, was irrelevant. Also, the bonus value rule only applies where the entire leasehold is taken and the lease is thereby terminated.

ARGUMENT.

I.

The Trial Court Erred in Not Awarding Lebenbaum All of the Rental Awarded for the Taking of the Leased Area.

1. The Lebenbaum lease was not terminated by this condemnation proceeding nor by the notice of termination dated August 4, 1944 [R. 305].

The trial court concluded that the lease was not terminated [C. 2; R. 234-235]. The judgment appealed from [R. 238] so determined by implication, by failing to award the *whole* compensation to the Gawzners. As we have stated, *supra*, page 14, such portion of the judgment is favorable to appellant Lebenbaum, and is correct upon the facts disclosed by the record and is supported by applicable law.

The notice to terminate, and the contentions of Gawzners that the lease was terminated, are predicated upon paragraph Ten of the lease [R. 291]. Said paragraph Ten discloses:

(a) That the lease was entered into with knowledge that the *State of California* has acquired a strip of land for highway purposes which it was temporarily permitting the lessors to use for hotel purposes and which Lebenbaum was to be temporarily allowed to use;

(b) That the parties contemplated that an *additional* portion of the premises to be leased to Lebenbaum might be condemned by the state or the county of Santa Barbara or any other *public body* for highway or other *public purpose*;

(c) That the parties contemplated that such condemnation proceeding would be one in which there would be an award which should belong to the lessor and an obligation in the nature of an assessment levied against the lessors' land which assessment should be assumed by the lessor, and

(d) That the parties contemplated a *permanent taking* of a portion of the *fee* and the consequent *permanent relocation* of existing buildings at the *expense of the lessors*.

In passing it should be noted that the Notice of Termination [R. 305] discloses that the lessors are not contending that the lessee was in default or that he had violated any term, provision or covenant of the lease. It should also be noted that the Court found that Lebenbaum had performed his obligations under the lease [F. 12; R. 226] and that, since the date of the Government's taking, Gawzners have refused to accept rent [F. 13; R. 226]. Without searching the record, this finding seems conceded by Gawzners in paragraph V of *their* proposed Findings [R. 202].

At the outset it should be recognized that if there were no paragraph in the lease relating to the situation that might arise by reason of a taking of the property in a condemnation, then the law would give the tenant an award for his leasehold interest. (*United States v. 21 Acres of Land*, 61 Fed. Supp. 268, 272. Thus, it appears that a condemnation provision is in *derogation* of the tenant's right to an award and is in the nature of a *forfeiture*. Hence, Gawzners must rely upon paragraph Ten as a *forfeiture*.

This lease to Lebenbaum is to be construed according to California law. (*California v. United States*, 169 F. 2d 914, 917.) Under such law forfeitures will be enforced if clear and unambiguous, but only if there is no other valid alternative under the language of the instrument. (*Lowe v. Ruhlman*, 67 Cal. App. 2d 828, 832, 155 P. 2d 671, 673.) Conditions involving a forfeiture of a lease must be strictly construed against the party in whose behalf they are invoked. (*Keating v. Preston*, 42 Cal. App. 2d 110, 117, 108 P. 2d 479, 483; Section 1442, California Civil Code.)

In California a contract is to be construed so as to produce equitable, as distinct from inequitable, results if the language used will admit of either construction, and a forfeiture of *an estate* will not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction. (*Startford Co. v. Continental Mtge. Co.*, 74 Cal. App. 551, 555, 241 Pac. 429, 431.) Furthermore, the lease, as a whole, is to be considered and construed in order to interpret paragraph Ten if paragraph Ten is susceptible of several interpretations producing different meanings and results. (*Lemm v. Stillwater Land & Cattle Co.*, 217 Cal. 474, 480, 19 P. 2d 785, 788.) Applying these principles of law, and returning to the facts, we find that paragraph Ten refers to a highway taking by the State and a possibility that an *additional portion* of the leased premises may be condemned by the State, the County or *any other public body*. Does that mean any other public body of *any kind* (such as the United States), or does it mean any other public body of *the State* which is similar in character to the County of Santa Barbara, *i. e.*, a lesser body politic of the State of California?

Gawzners contended in the Court below, and will undoubtedly contend here, for the first construction. We contended successfully there and reaffirm here that the latter is a permitted construction, is the more equitable and is, in fact, required by reason of the following:

a) This lease shows on its face that it was carefully and deliberately drawn by competent and experienced counsel. Under such circumstances it is extremely unlikely that if its was intended to include the United States by using the designation “or other public body,” the scrivener would have named the United States *last* in the order of priority for it is well established that the usual procedure and form followed by competent and experienced counsel is to name public authorities in the order of their superiority.

“It is unlikely that in drafting a lease the parties would, if they intended to include the United States, place it at the end of a list * * *.”

United States v. 150.29 Acres of Land, 148 F. 2d 33, 35 (7th Cir.).

b) The very scrivener who prepared this lease used the *usual* order of priority and designated the United States by name and first in point of position where it was intended that the lease applied to the United States.

“or for any purpose or use in violation of the laws of the United States or of the State of California or of * * * the County of Santa Barbara.” [Par. Fourteen, R. 295.]

It is difficult to explain the *failure to name* the United States in paragraph Ten in a paragraph laying the foundation for a right of forfeiture and at the same time expressly naming it in its proper order in paragraph Fourteen which, with paragraph Twenty-two [R. 299], laid other grounds for forfeiture, if the scrivener and the parties *intended* that the United States was to be included by the term “any other public body” as a possible condemnor in paragraph Ten.

c) The doctrine of *ejusdem generis*:

“The law, therefore, must adopt a formula to meet such situations and this formula, known as an aid to interpretation is the doctrine of *ejusdem generis*, which means that when general words follow specific words the former will be strictly limited in meaning to things of like kind and nature.”

Bader v. Coale, 48 Cal. App. 2d 276, 279, 119 P. 2d 763, 765.

d) The reference to the fact that the condemnor (referred to as “any other public body”) might condemn additional portions of the leased premises “for highway purposes.” While other public bodies of the State of California within the County of Santa Barbara (the City of Santa Barbara, the County of Santa Barbara, Santa Barbara Flood Control District, etc.) could lawfully exercise the State’s power of eminent domain for acquiring lands for *highway purposes* (cf. App. ii), the United States may not engage in such activity.

“It is not a function of the National Government to build or maintain or improve the road system of

the various states. That is a responsibility of the state governments, and not of the National Government.”

United States v. Alderson, 53 Fed. Supp. 528, 530.

e) The reference to payments of “*assessments levied in such eminent domain proceedings*” [R. 291]. The important words are those which have been emphasized. There are *State* eminent domain proceedings which may be exercised by it and by *its lesser* “other public bodies” in which assessments are levied upon the benefited lands (*cf.* App. ii), but there was not at the date of this lease, and there is not now, any eminent domain proceeding *available to the United States* in which *assessments* may be levied. Clearly, it would require a tortured and tenuous construction to interpret the words “or other public body” to *include the United States* as a contemplated condemnor in paragraph Ten of this lease.

Again, paragraph Ten refers to a condemnation acquisition “for highway or *other public purpose*” [R. 291]. Does the term “other public purpose” include this temporary war taking of a portion of the Lebenbaum lease by the United States or does the language which immediately follows the words “highway or other public purpose,” to-wit:

“the amount of the award *in any such* condemnation suit shall belong solely to the lessors, but lessors shall pay any and all assessments levied *in any such* condemnation proceeding,”

necessarily import that the scrivener and the parties meant such highway or other (similar) public purpose which would be the subject matter of an eminent domain pro-

ceeding under State law *in which there would be an award and an assessment?* Gawzners contended in the Court below for the former interpretation; we, successfully, for the latter and we renew such contention here. We submit that it is impossible to give effect to the repetition of the words “in any such condemnation proceeding” without construing the entire sentence to refer to and to be limited by the entire paragraph and to refer to a condemnation proceeding under state law in which *assessments are levied as a part of the proceedings*. Such a proceeding is, as we have shown, exclusively limited to the State of California and its lesser public bodies (*cf.* App. ii). There is no such procedure in Federal eminent domain.

Gawzners stressed in the lower court and may urge here, that paragraph Ten *assigns* the award, in this case for the taking of a temporary use and occupancy of a portion of Lebenbaum’s lease to them. They rely upon that portion of said paragraph which reads that:

“The amount of the award *in any such condemnation suit* shall belong solely to the lessors.”

We successfully urged below and reiterate here, that such words were used by a skillful and experienced scrivener, learned in the law, who was using precise grammar and punctuation and that it is but a portion of one sentence in one integrated paragraph. With such a background it is clear that such assignment of the award is limited to the assignment of an award in a condemnation suit for highway or other (similar) public purpose *under State law in which there is an award and a levy of an assessment* upon the property benefited by the improvement for which the condemnation is prosecuted and that it does not refer to and include an award in a proceeding such as this.

Such phrase is contained in one compact sentence, separated by commas:

“In the event the State of California or the County of Santa Barbara or any other public body shall, by condemnation, acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any *such* condemnation suit shall belong solely to the lessors, but lessors shall pay any and all assessments levied in any *such* condemnation proceeding.” (Emphasis supplied.)

“Commas are punctuation marks used to indicate slight breaks in the continuity of ideas or construction.”

Macmillan’s Modern Dictionary, 1938 Ed.

“Commas separate a sentence into divisions according to construction.”

Webster’s Encyclopedic Dictionary, 1948.

We again refer to the repeated use of the words “any *such* condemnation proceeding.” The use of “such” implies “of that kind which has been indicated.” (Macmillan’s Modern Dictionary, 1938 Ed.) It also implies “the same as has been mentioned.” (Webster’s Encyclopedic Dictionary, 1948.) Thus it is made clear that the entire paragraph refers to a State condemnation proceeding and not to a Federal condemnation suit, such as this, because in the latter suit there can be no assessment against the lessor’s property.

Gawzner’s stressed in the lower court and may contend here, that the last sentence of paragraph Ten [R. 292] gave them the right to terminate Lebenbaum’s lease because the Government’s occupancy included more than 50% of the rentable rooms and precluded Lebenbaum’s

use of the beach during such occupancy. Here, again, they overlooked the precise language which is used and the clear and unmistakable connection of each subsequent sentence to the one preceding it. The sentence referred to reads:

“Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days’ written notice to the other.” (Emphasis supplied.)

The italicized words furnish the key to proper construction. The words “further in this connection” disclose that this sentence is related to, and is an additional provision in respect to, something that has been previously referred to and described. The words “such condemnation,” as we have shown, imply the kind which has been previously indicated or of the same nature as that previously mentioned. Having that in mind and referring to the portions of the paragraph which immediately preceded the quoted portion, we find again that the provisions are all limited to a condemnation proceeding under State law in which assessments are levied against the lands benefited which, of course, *excludes* this proceeding.

Under California Civil Code, Section 1648, it is provided:

“However broad may be the terms of a contract, it extends only to those things concerning which it appears the parties intended to contract,”

and in *Conover v. Smith*, 83 Cal. App. 227, 234, 256 Pac. 835, 838, the Court says:

“When general and specific provisions of a contract deal with the same subject matter, the specific provisions, if inconsistent with the general provisions, are of controlling force.”

To save time and to shorten this brief, we refer to Judge Hollzer’s opinion in 61 Fed. Supp. 268, 270, to point out inequities which would result from a construction in favor of forfeiture if paragraph Ten were construed as contended for by Gawzners.

“* * * The contentions advanced on behalf of the owners would lead to the inequitable result that the demised premises would be returned to the latter prior to the expiration of the original term of the lease, and all of the tenant’s rights would be forfeited to the landlord, although the lessee had committed no default, and although no other event had occurred which, under the provisions of the lease, entitled lessors to recover possession of the premises.
* * * The rights thus forfeited would include the tenant’s exclusive privilege to the possession and use of said premises and of all improvements thereon, including the improvements paid for by him, and also his right to have refunded to him any unexpended balance of the aforementioned deposit.”

Even if paragraph Ten warranted a forfeiture, it would be of a kind governed by Section 3275, California Civil Code. Here, Gawzners sustained and could sustain no loss. Lebenbaum was and is completely liable on the lease and Gawzners may proceed, in a State Court of competent jurisdiction, to establish and recover the full unpaid rent, providing only, that they vacate or rescind

their anticipated breach and admit the continued existence of the lease. *It is only because of their refusal to accept rent that they have not heretofore been paid* [F. 13; R. 226].

We believe that it is also proper to note that the burden of proof of a forfeiture is on the person claiming such right (*Stratford v. Continental Mtge. Co.*, 74 Cal. App. 551, 555, 241 Pac. 429, 430; *Reidman v. Barkwill*, 139 Cal. App. 564, 567, 34 P. 2d 744, 746), and the record here discloses that the Gawzners offered no proof whatsoever upon this issue beyond the text of the document. Certainly, had the parties intended that the condemnation clause be general or that the United States be included, some evidence of the surrounding circumstances and the acts of the parties would have been available in support thereof. It is no answer that Lebenbaum did not adduce such proof. The burden was not on him to prove the non-existence of the forfeiture and *both* of the trial judges had ruled in his favor.

Summarizing, we do not dispute that a general condemnation clause may result in a forfeiture of a tenant's right to a condemnation award. We do not dispute that the term "other public body" may be used to include the United States or that it is a "public body." We do not dispute that the instant case involves an eminent domain proceeding for "a public purpose." We *do* assert that paragraph Ten is not a general condemnation clause but is a *limited* condemnation provision covering a particular kind of eminent domain proceedings only and that it, manifestly, was never intended to include the United States nor this type of a condemnation proceeding.

In the light of the text of this lease, the rules governing its construction, the evident inequity and injustice which

would follow a construction which would result in a forfeiture of Lebenbaum's rights, the fact that the construction given by Judges Hollzer and Weinberger is amply supported and is fair and just to all, we believe this Court should and will affirm their conclusions and judgment to the effect that the Lebenbaum lease remained in full force and effect during the Government's temporary occupancy. In fact, we believe the short answer to Gawzners' contentions is that on December 15, 1943, the United States was engaged in a bitter war with two supposedly powerful enemies and the taking of temporary occupancy of resort hotels on the Southern California coast for a Redistribution Station [R. 39] to rest and rehabilitate combat troops was un contemplated and unknown, at least to the general public.

Before closing upon this point it is important to note that in the Notice of Termination [R. 305] Gawzners include two contentions in support of the alleged right to terminate the lease, both of which are without support in law, viz.:

A. That the Government's taking made it impossible for Gawzners to perform their covenant to keep Lebenbaum in quiet and peaceable possession [R. 309]. Such was not their covenant [Par. Thirty-one; R. 304]. Their covenant was against "let or hindrance on the part of the lessors or anyone claiming by or through them." As we have seen, the Government, through these proceedings, did not claim by or through the Gawzners—it carved a new

estate out of a portion of Lebenbaum's lease (*Duckett v. U. S.*, 266 U. S. 148, 151, 69 L. Ed. 216, 218). Such a taking in eminent domain is *not* a violation of the landlord's covenant of quiet and peaceable possession (*Gluck v. Baltimore*, 81 Md. 315, 324, 32 Atl. 515, 516). It was neither an eviction nor a release (*Gluck v. Baltimore*, 81 Md. 315, 324, 32 Atl. 515, 516).

B. That the Government's taking caused the consideration of the lease, to-wit, the possession of the premises, to fail without fault or act of Gawzners. This is not the law and, if Gawzners meant that thereby the condemnation worked a release of the lessee's obligation to pay rent, it is likewise contrary to law (*Pasadena v. Porter*, 201 Cal. 381, 387, 257 Pac. 526, 528; *Gluck v. Baltimore*, 81 Md. 315, 324, 32 Atl. 515, 516; *Leonard v. Auto Car Sales & Service Co.*, 392 Ill. 182, 195, 64 N. E. 2d 477, 483).

It is clear, therefore, that the trial court erred in not awarding to Lebenbaum the market rental value of the temporary occupancy together with the present value of his obligation to Gawzners for rent payable during such temporary occupancy. In this case, as we shall next show under Point II, that sum would represent the balance then on deposit in the registry less the apportionment to be paid to the Gawzners as the market rental value of the unleased area.

2. The trial court should have *followed through* and awarded the total compensation for the rental of the leased area to Lebenbaum.

a) Because he, alone, is the one from whom possession was taken.

It should be first noted that the lease is a conveyance of an estate in real property (*Pasadena v. Porter*, 201 Cal. 381, 386, 257 Pac. 526, 528).

“It has a dual character. It presents the aspect of a contract, and also that of a conveyance. Consequently a lease has *two sets* of rights and obligations—those growing out of the relation of landlord and tenant and said to be based on privity of estate and those growing out of the express stipulation said to be based on privity of contract.”

15 Cal. Jur., “Landlord and Tenant,” §19, pp. 614-615.

“Immediately upon the commencement of the term a tenant succeeds to all the rights of the landlord that are annexed to the estate, so far as the possession and enjoyment of the premises are concerned.”

15 Cal. Jur., “Landlord and Tenant,” §76, p. 667; *Walther v. Sierra Ry. Co.*, 141 Cal. 288, 290-291, 74 Pac. 840, 841.

“The situation here is one in which the sovereign exercising the power of eminent domain, is substituting itself in relation to an estate or tenancy for years in place of the lessee, but only as to a portion of such lessee’s ownership thereof.”

U. S. v. 21 Acres of Land, 61 Fed. Supp. 268, 273.

b) Gawzners had no right to possession and none could be taken from them.

32 Am. Jur., “Landlord and Tenant,” § 76, pp. 89-90; §195, p. 185.

The only rights belonging to the landlords (the Gawzners) during the existence of the lease, as to the leased area taken by the Government, were:

1. Their reversion, *i. e.*, their right to convey or encumber the fee subject to the lease (which was not taken).

“It is clear that the Government has not acquired any part of the fee and that plaintiff’s (lessor’s) reversionary interest in the fee has not been affected by the proceeding.” (Insertion for clarification.)

Leonard v. Auto Car Sales & Serv. Co., 325 Ill. App. 375, 381, 60 N. E. 2d 457, 460.

2. Their right to collect rental *from the lessee* (which was not taken or frustrated).

“A contract may be frustrated, but a demise is more than a contract. It is a conveyance of an estate in land or a chattel real * * *.”

Leonard v. Auto Car Sales & Serv. Co., 325 Ill. App. 375, 387, 60 N. E. 2d 457, 462.

“When it is remembered that every lease possesses a dual aspect, being both a conveyance and a contract, a ready explanation may be found for the view that a lessee may cease to be entitled to the possession and yet remain bound by his contractual obligation to pay rent. * * * The appropriation of its (the lessee’s) temporary use by the United States merely carved out of the appellant’s (lessee’s) long term lease a short term occupancy (*United States v. General Motors*, 323 U. S. 373, 382, 89 L. ed. 311, 320) and destroyed neither the property nor appellant’s (the lessee’s) leasehold estate therein * * *. That appellant

(lessee) is entitled to receive from the Government full compensation for so much of its leasehold estate as is appropriated to public use and thereby obtain complete indemnity for its loss is not open to question.” (Insertion for clarification.)

Leonard v. Auto Car Sales & Serv. Co., 392 Ill. 182, 189, 64 N. E. 2d 477, 480-481.

“Being entitled to just compensation, there is no injustice in holding the defendant (lessee) liable to pay the rent, even though it cannot actually occupy the leased premises.” (Insertion for clarification.)

Leonard v. Auto Car Sales & Serv. Co., 325 Ill. App. 375, 391, 60 N. E. 2d 457, 464.

But not, as we will show, from a condemnor who does not take the fee and does not take *all* of the lessee’s term but merely takes a portion thereof. Of course, here, the Government did not take any portion of Gawzners’ reversion [R. 54] and did not take their right to collect the contract rent from Lebenbaum [R. 54; C. 2; R. 234-235]. The Government did not take *under* the Gawzners, it carved a new leasehold estate out of Lebenbaum’s leasehold estate (*Duckett v. U. S.*, 266 U. S. 148, 151, 69 L. Ed. 216, 218). But its position is somewhat in the analogy of a *subtenant*, as if it were:

“* * * a lease by the long term tenant (*i. e.*, Lebenbaum) to the temporary occupant (*i. e.*, the Government) * * *.”

United States v. General Motors, 323 U. S. 373, 382, 89 L. Ed. 311, 320.

- c) Gawzners had no right in or lien upon the portion of the Government's obligation which arose out of the taking of temporary occupancy of Lebenbaum's longer leasehold estate.

Compensation in eminent domain proceedings—

“* * * is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good a position pecuniarily as if his property had not been taken.”

United States v. General Motors, 323 U. S. 373, 379, 89 L. Ed. 311, 319.

Hence, unless Gawzners had a right in the use or occupancy of Lebenbaum's term, or a lien thereon to secure Lebenbaum's obligation to them for rent, there was no interest *in such leasehold* taken from Gawzners and they would have no right to the compensation for such taking.

The lease [R. 275] does not give Gawzners any right to use or occupancy of the premises during the term. In fact, paragraph Two [R. 281] specifically states that the premises are let to and they shall be used by the lessee. We shall treat of eviction in a later portion hereof. Said lease does not give the lessors a lien to secure the payment of rent. In the absence of such express provisions, as we have already shown, the use and occupancy of the premises during Lebenbaum's term belonged to him and Gawzners had no right therein. Under California law there is no privity of estate or contract between a lessor and a *sublessee* if we assume that the Government, in effect, sustained such relation (*Erickson v. Rhee*, 181 Cal. 562,

567, 185 Pac. 847, 849; *Webb v. Jones*, 88 Cal. App. 20, 28, 263 Pac. 538, 542). Also in California, in the absence of an express provision therefor in the lease, a landlord has no lien upon the leasehold estate of the lessee or upon the income therefrom to secure payment of rents contracted to be paid or for the value of the use and occupancy of the property (15 Cal. Jur., "Landlord and Tenant," §137, p. 726; *Gruber v. Pacific States Sav. & Loan Co.*, 13 Cal. 2d 144, 148, 88 P. 2d 137, 139; *Hitchcock v. Hassett*, 71 Cal. 331, 333, 12 Pac. 228, 229).

"The landlord is not entitled to compensation for damages to the property of the tenant and if the lessee's interest only is injured the lessor is entitled to no part of the compensation."

29 C. J. S., "Eminent Domain," §198, p. 1106.

d) The fund then remaining in the registry of the Court was the agreed monetary value of the Government's obligation for rental for the leased area and for the unleased area.

We will elaborate upon this phase under the second point of our argument.

What, then, is the measure of damage to which Lebenbaum was entitled where only a part of his leasehold estate was taken, his term continued and his contract obligation for rent continued?

"The Government (substituted) itself as occupant of the demised premises in place of the owner of the right of such occupancy. The owner of such right

being the lessee, it is the latter who 'must be put in as good a position pecuniarily as if his property had not been taken,' and this is to be done by paying to him the value of the interest taken." (Insertion for clarification.)

United States v. 21 Acres of Land, 61 Fed. Supp. 268, 272.

"As * * * the lease has not been terminated, defendant (lessee) is guaranteed the right to recover the reasonable value of that portion of its leasehold estate which has been appropriated by the Government in the pending condemnation proceedings in the federal court. Plaintiff (lessor) will *have no claim against the Government*, since the Government will not have appropriated any interest of plaintiff's in the premises * * *." (Emphasis supplied.)

Leonard v. Auto Car Sales & Serv. Co., 325 Ill. App. 375, 391, 50 N. E. 2d 457, 464.

Under such circumstances, therefore:

"If the covenant to pay rent is not affected by the proceeding and judgment of condemnation, it is clear that * * * the lessee continuing personally liable but losing his estate, and right to its enjoyment, would be entitled to receive not merely the value of the term, but also a sum of money equivalent to the present value of the sum of the rents payable *in futuro*. That is, he should receive the value of his term subject to the rent, *and* such further sums as

would be considered a present equivalent for the rent thereafter to be paid * * *.” (Emphasis supplied.)

Pasadena v. Porter, 201 Cal. 381, 387, 257 Pac. 526, 528.

Cf. Gluck v. Baltimore, 81 Md. 315, 325, 32 Atl. 515, 517.

“The obligation of the appellant (lessee) to pay rent * * * is of decisive importance in determining the amount of damages due the appellant (lessee) * * *. If, after a condemnation, a lessee *remains under obligation to pay rent*, it is entitled to damages equal to the fair rental value of the leased premises * * *.” (Insertions for clarification; emphasis supplied.)

John Hancock Mut. Life Ins. Co. v. U. S., 155 F. 2d 977, 978.

This expresses the true rule and exemplifies why the Court erred in not awarding the value of the leasehold and the value of the rents *in futuro*, to Lebenbaum. The Court had concluded that the lease was not cancelled or terminated by the condemnation proceeding [C. 2; R. 234-235] and had found that Lebenbaum had performed his obligations under the lease [F. 12; R. 226] and that he had not paid rent because the lessors had refused to accept rent during the period of the Government's occupancy [F. 13; R. 226]. As we have seen, under such circumstances the law would keep Lebenbaum's obligations to Gawzners in full force and effect and he was not released from his rental obligation.

II.

The Trial Court Erred in Not Finding and Decreeing That the Parties Had Abandoned the Measure of Damages Fixed by the Fifth Amendment and Had Permanently Fixed the Sum of \$113,704 Then Remaining in the Registry as the Agreed Rental to be Paid by the Government for the Compensation, Other Than for Restoration, for Its Taking of the Leased and Unleased Areas.

This is a restatement of Lebenbaum's Point 3 [R. 274]. By Stipulation [R. 45] approved by the Court and incorporated into a Judgment [R. 53], the appellants agreed that all compensation to be paid by the Government was the sum of \$205,000, plus certain improvements which the Government had made and would relinquish to the fee owners; that such sum and relinquished property was "fair, just and adequate compensation" [R. 47, 55] for the Government's obligation for *rent* and for *restoration* and that such would be the testimony of competent witnesses [R. 49]. Such stipulation and judgment covered both the leased and unleased areas and did not segregate the award as between them.

By subsequent stipulation [R. 98] approved by the trial court and incorporated into an Order [R. 103], the *restoration* portion of the Government's obligation was fixed at \$91,296 and such sum was distributed between the appellants in accordance with their stipulation and there was left in the registry, at the date of the judgment appealed from, the sum of \$113,704 [F. 21; R. 231].

Appellant, Lebenbaum, contends:

- a) The parties had the right to fix compensation by agreement and where there is such a contract these cases hold that neither party can offer contrary evidence.

Danforth v. United States, 308 U. S. 271, 282-283,
84 L. Ed. 240, 245;

Wachovia Bank v. United States, 98 F. 2d 609,
611, 612.

- b) When so fixed it became binding in lieu of and supplanted the measure fixed by the Fifth Amendment.

“But the method used by the courts to determine ‘just compensation’ in an adversary proceeding where parties have failed previously to agree on its amount is not the exclusive method of determining that question. The Fifth Amendment does not prohibit land owners and the Government from agreeing among themselves as to what is just compensation for property taken. Nor does it bar them from embodying that agreement in a contract as was done here.
* * * Since (they) have chosen to stand on their contract terms as to the amount they will receive for their property, rather than to have ‘just compensation,’ in the constitutional sense, fixed by the courts we must look to those terms for the measure of their compensation.”

Albrecht v. United States, 329 U. S. 599, 603,
91 L. Ed. 532, 538.

“The right to just compensation for property taken and the right to an award for an amount expressly agreed upon, are *inconsistent* rights. The former rests upon equitable principles and comprehends that the owners shall be put in as good a position pecuniarily as he would have been if his property had not been taken. The latter rests upon express agreement *regardless of whether the owner’s position pecuniarily is worse or better than if he had not parted with his property.*” (Emphasis supplied.)

U. S. v. 3.25 Acres of Land, 53 Fed. Supp. 884, 885-886.

- c) Rental and restoration constituted full liability of the Government.

U. S. v. Land in Mariposa County, Calif., 77 Fed. Supp. 798, 800.

- d) It necessarily follows then that when restoration was fixed and paid by agreement, the remaining sum of \$113,704 represented *agreed rental* for the leased and unleased areas.

III.

The Trial Court Erred in Failing to Separately Find and Decree the Sum Due Appellants Gawzner for the Government's Obligation to Them for the Rental of the Unleased Area.

We believe that it is sufficient to refer to our Summary of this Argument, *supra*, page 14. Authorities previously cited under Points I and II support each and every statement therein made and the conclusion logically follows that if the \$113,704 remaining in the registry represented the agreed rental compensation for the leased and unleased areas, it became necessary for the trial court to fix both and to deduct the amount to be disbursed to Gawzners as agreed rental for the unleased area from the total sum of \$113,704 and order the balance disbursed to Lebenbaum. There were, of course, several methods by which this could have been done but the simplest one was to fix the rental value of the unleased area and deduct such amount from the total in which case the remainder would be the agreed rental for the leased area. The record discloses that the Court failed to do either [R. 214-236, 237-239]. Instead, the trial court assumed a purported jurisdiction in equity and further purported to fix the rights and obligations as between the Gawzners and Lebenbaum under the contract provisions of the lease (*i. e.*, the probable percentage rental which Lebenbaum would be required to pay to the Gawzners during the term of the Government's occupancy) and then, instead of awarding such amounts to Lebenbaum, the Court purported to make

an equitable distribution under which it attempted to pay Gawzners such prospective rental by distribution out of the remaining portion of the agreed award against the Government. This, as we shall note under Points V and VI, was contrary to the law and beyond the jurisdiction of the Court.

IV.

The Court Erred in Denying Lebenbaum's Motion to Exclude Appellants Gawzner From Participation in the Trial Except as to the Fixing of the Value of the Use and Occupancy of the Unleased Area.
[R. 6, 16; 262, par. 9.]

The Court determined that the lease was still effective [R. 16]. This, by operation of law, eliminated any right of Gawzners in the compensation for the use and occupancy of the leased area.

As we have already seen, Gawzners were not entitled to share in any part of the rental compensation to be paid by the Government for the taking of a portion of Lebenbaum's leasehold interest:

“The landlord is not entitled to compensation for damages to the property of a tenant, and *if the lessee's interest only is injured* the lessor is entitled to no part of the compensation.” (Emphasis added.)

29 C. J. S., title, “Eminent Domain,” Sec. 198,
page 1106.

“* * * (lessors) will have no claim for the reasonable value of the use of the premises *against the Government* since the Government will not have ap-

propriated any interest of the (lessors) in the premises.” (Emphasis supplied; insert made for clarification.)

Leonard v. Auto Car Sales & Serv. Co., 325 Ill. App. 375, 391, 60 N. E. 2d 457, 464.

In this instance all obligations of the Government for restoration and repair had been completely paid and satisfied before the judgment appealed from was entered [R. 103, 237]. But even had such not been the case, the landlords (Gawzners) still had no right to participate in the award in so far as restoration and repairs were concerned since the covenants in the lease were still operative and enforceable.

“It (the lessor) had no interest in the money awarded to the defendants (the lessees), but only an ultimate property in the building which should be upon the premises when the defendants (lessees) surrendered it. If that building was kept in the condition in which the (lessees) agreed to keep it, it would have been a matter of no interest to the plaintiff (lessor) if the award made to the (lessees) was not large enough to cover the expenses of the repairs and reconstruction; and so, if the award was more than sufficient, that was of no interest to the (lessors). The award to the (lessees) belonged to them because it was an amount found by the Commissioners as a sum which would enable them to pay the cost of the repairs to the building. It may have been too much, but if it was, it was no affair of the (lessor). If at the close of the lease it (lessor) got what the (lessees) contracted to give it, it had all it was entitled to. * * *.” (Insertions for clarification.)

Fargo v. Browning, 61 N. Y. Supp. 301, 303.

It is, of course, elementary that the only persons entitled to be *heard* in an eminent domain proceeding are those having some interest which has been taken.

“The Government’s liability for compensation to be awarded herein is limited by the statutes authorizing the proceeding * * *. Since appellant’s rights were not condemned, no compensation can be awarded in this proceeding and consequently its Notice of Appearance and claim were properly stricken.”

N. Y. Telephone Co. v. U. S. (C. C. A. 2), 136 F. 2d 87, 88.

“In such a controversy (as an eminent domain proceeding) third persons not interested in the land in subordination to or in common with the person whose right was sought to be taken, but claiming adversely, have no right to intervene * * *.”

“Section 1247, C. C. P. provides that in such (eminent domain) actions the court shall have power to hear and determine all adverse or conflicting claims to the property sought to be condemned. It is obvious from this language that these provisions do not contemplate or authorize the admission of a person as a party who does not show that he has some interest in or right to the property sought to be condemned, *or of a person whose statement of his right shows that he has no such interest.*” (Emphasis supplied; insert for clarification.)

San Joaquin, etc. v. Stevinson, 164 Cal. 221, 236-237, 240, 128 Pac. 924, 930.

The Court should have restricted Gawzners’ participation to the fixing of the compensation to be paid by the Government for the unleased area.

V.

The Court Erred in Refusing to Find and Decree That Its Jurisdiction Was Limited to Determining.

- a) what interest the plaintiff had taken;
- b) from whom they were taken;
- c) what the appellants had fixed and agreed to be the compensation for such taking, after they had deducted and received their fixed and agreed compensation for restoration;
- d) who was entitled to such compensation [R. 274].

VI.

The Court Erred in Refusing to Find and Decree That It Was Without Jurisdiction to Try and Determine the Contract Rights of Appellants Gawzner, Against Appellant Lebenbaum, to Collect Rents Under the Lease During the Plaintiff's Occupancy of the Leased Premises, or to Enforce Payment Thereof. [R. 274.]

In order to reduce the size of the transcript of the record, counsel for the respective appellants entered into an "agreed statement as to the record of *testimony*" [R. 342] by which they eliminated practically all of the arguments made by counsel including those made in support of objections and motions to strike. In this instance it appears that there was omitted substantially all of the objections made by counsel for Lebenbaum in support of his objections to the Court proceeding as it did. However, the Reporter's Transcripts were sent up as a part of the record by the Clerk of the District Court and we have quoted in Appendix iii the portions of said counsel's argument upon such issues.

The error of the Court is demonstrated by the following established principles:

- a) This is a special proceeding in the nature of an action at law.

“We do not doubt that a proceeding for an assessment of damages for the taking of private property for public use is one at law.”

Cherokee Nation v. Southern Kans. R. R. Co., 135 U. S. 641, 651, 34 L. Ed. 295, 300.

- b) It is not an equity case.

“It possesses none of the essential elements of a suit in equity within the meaning of the statutes defining the jurisdiction of the courts of the United States.”

Cherokee Nation v. Southern Kans. R. R. Co., 135 U. S. 641, 651, 34 L. Ed. 295, 300.

“The action (in eminent domain) was not a suit in equity to determine the title to the water, generally, or one *in which a general adjudication of such title could be made*. It was a special proceeding for a particular purpose—namely, to condemn the Stevinson right for the benefit of the plaintiff as the purveyor of the public use.”

San Joaquin v. Stevinson, 164 Cal. 221, 236-237, 128 Pac. 924, 930;

Pasadena v. Porter, 201 Cal. 381, 388, 257 Pac. 526, 529.

- c) It is not a proceeding *in personam*.

Monongahela Nav. Co. v. U. S., 148 U. S. 312, 326, 37 L. Ed. 463, 468.

d) But is a proceeding *in rem*.

“A condemnation proceeding is an action *in rem*. It is not the taking of rights of designated persons, but the *taking of the property itself*.” (Emphasis by the Court.)

Eagle Lake Imp. Co. v. U. S., 160 F. 2d 182, 184.

e) The fund remaining on deposit represented the rental for the rights taken and was *all* that was left for distribution and the full measure of the Court’s jurisdiction.

“When property is condemned, the amount paid for it stands in the place of the property and represents all interests in the property acquired. *U. S. v. Dunnington*, 146 U. S. 338, 350, 353; 36 L. ed. 996.”

Eagle Lake Imp. Co. v. U. S., 160 F. 2d 182, 184;

San Joaquin etc. v. Stevinson, 164 Cal. 221, 236-237, 128 Pac. 924, 930;

Pasadena v. Porter, 201 Cal. 381, 388, 389, 257 Pac. 526, 529.

It was *all* that was left for distribution because it was the *agreed balance* and as such was not subject to be measured by the obligations under the Fifth Amendment (*Albrecht v. United States*, 329 U. S. 599, 603, 91 L. Ed. 532, 538; *United States v. 3.25 Acres of Land*, 53 Fed. Supp. 884, 885-886). It was the full measure of the Court’s jurisdiction because that jurisdiction was limited to the adjustment of the remedies of the landlord and tenant *against* the condemnor.

“The court sitting (in an eminent domain proceeding) has no equitable jurisdiction, and accordingly has no power to reform or revise the lease in question, nor to determine to what extent the covenant to pay

rent shall be affected, if at all * * *. The landlord and tenant are confined to their remedies against the (condemnor) * * *”

Pasadena v. Porter, 201 Cal. 381, 388, 389, 257 Pac. 526, 529.

- f) This was the agreed rental value in lieu of the constitutional market rental value.

Albrecht v. United States, 329 U. S. 599, 603, 91 L. Ed. 532, 538.

- g) The only jurisdiction which had been invoked was under the eminent domain statute.

N. Y. Telephone Co. v. U. S., 136 F. 2d 87, 88;

Pasadena v. Porter, 201 Cal. 381, 388, 389, 257 Pac. 526, 529;

San Joaquin etc. v. Stevinson, 164 Cal. 221, 236-237, 128 Pac. 924, 930.

- h) The appellants (defendants) and the trial court were limited as to the remedies and jurisdiction to the remedies which the appellants had against the Government as condemnor.

“The action was not * * * one in which a general adjudication of * * * title could be made.”

San Joaquin, etc. v. Stevinson, 164 Cal. 221, 236, 128 Pac. 924, 930.

“In this proceeding the landlord and tenant are confined to their remedies against the (condemnor).”

Pasadena v. Porter, 201 Cal. 381, 389, 257 Pac. 526, 529.

- i) There was no federal jurisdiction here invoked and available to the Court and the appellants as to the matters not affecting appellants' rights against the Government as condemnor, such as controversies *in personam inter se* because there was no diversity of citizenship.

In this connection it is to be noted that the trial court apparently forgot that there was no Declaration of Taking [R. 185]; Title 40, Section 258a, U. S. C. does invest a federal trial court with jurisdiction to exercise equitable jurisdiction in eminent domain proceedings in effecting disbursement of the award *in cases in which the Declaration of Taking has been filed* (*Swanson v. U. S.*, 156 F. 2d 442, 447). But no such right exists in the *absence* of such Declaration of Taking, such as existed in this case. Furthermore, even if there had been a Declaration of Taking, such equitable jurisdiction would not include the right to determine *rights in personam* which did not vest an interest, estate or lien in or upon the right taken or the fund which represented it (*U. S. v. Certain Land in Annapolis, Md.*, 46 Fed. Supp. 441, 447).

We appreciate that the record shows extreme patience and sincerity on the part of the trial judge and that his every action and ruling was intended to safeguard and protect his conception of the equitable rights of all. We have no doubt that he may have considered a possible loss by Gawzners if they were not paid their rent out of the award, although the entire evidence in the cause gave no indication of such a purpose on the part of Lebenbaum,

or that such an event was other than the remotest possibility. As we have seen, the Court expressly found that Lebenbaum had fully complied with the terms, provisions and covenants of the lease [F. 12; R. 226] and even the notice by Gawzners made no claim of default on his part [R. 305]. Such a remote hypothesis has been considered and rejected by the Supreme Court of California.

“* * * ‘if a case should arise where, upon the payment of the value of the leasehold interest to the tenant, the remedy of the landlord to collect his rent might be impaired or defeated on account of the insolvency of the tenant, or other cause, a court of equity might interpose to prevent the payment of the damages recovered into the hands of the tenant, and appropriate the fund, or so much thereof as might be necessary, to the payment of the rents due or to become due from the tenant to the landlord during such time as the lease might, by its terms, continue to run.’ We express no opinion as to the question whether or not such a proceeding would lie *in an independent action between appellant and respondent*, but see no room for its invocation in the present situation of the parties. *In this proceeding the landlord and the tenant are confined to their remedies against the condemning municipality.*”

“It has been argued here that, if the respondent be allowed to recover for the full value of the leasehold interest, there will be handed over to the tenant a portion of the damages which is the equivalent of the rent to be paid, and appellant may lose her rent by the insolvency of the respondent, or otherwise. The

same contention was advanced in *Gluck v. Baltimore, supra*, and the court said: 'It has, however, been contended that, if the tenant should be allowed to recover for the full value of the leasehold interest, and the landlord should be required to rely upon the personal obligation of the tenant for the payment of rent, a rule of this character would or might in many instances result in great loss to the landlord. At best, this is a mere suggestion of a possible hardship * * * Obviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results. That it may, in consequence, operate in some instances with apparent, or even with real harshness and severity, does not indicate that it is inherently erroneous. Its consequence in special cases can never impeach its accuracy.' "

Pasadena v. Porter, 201 Cal. 381, 388, 389, 257 Pac. 526, 529.

VII.

If the Court Had Jurisdiction to Determine and Enforce Payment of the Rental Due From Lebenbaum to Gawzners Under the Lease, During the Period of Plaintiff's Occupancy of the Leased Premises, It Should Have Found and Decreed That Such Rental Was the Minimum Guarantee of \$1500 Per Month as Provided in Paragraph Three of the Lease [R. 275].

This point is completely treated in our Summary of the Argument, *supra*, page 20.

VIII.

The Court Erred in Overruling Lebenbaum's Objections to, and Denying His Motions to Strike the Answers of the Witnesses Allen and Frisbie as to the Bonus Value of Lebenbaum's Leasehold Estate.

In view of the fact that the appellants, by stipulation, had fixed the compensation in an agreed amount as the agreed award for rental of the leased and unleased areas, the question as to what might or might not have been the bonus value measure under the Fifth Amendment, was irrelevant. Also, the bonus value rule only applies where the entire leasehold is taken and the lease is thereby terminated, or where a portion of the leasehold is taken but the lessee's obligation for rent is terminated.

U. S. v. General Motors Corp., 323 U. S. 373, 382, 89 L. Ed. 311, 320;

U. S. v. Petty Motor Co., 327 U. S. 372, 378, 381, 90 L. Ed. 729, 734, 736;

John Hancock Mut. Life Ins. Co. v. U. S., 155 F. 2d 977, 978.

Appellant Lebenbaum, therefore, respectfully represents that this Honorable Court should remand the cause to the trial court with directions:

1. To find that the parties by agreement have fixed the rental compensation for the leased and unleased areas, in the sum of \$113,704;
2. To find that such sum by agreement, represents 77.7% of the market rental value of said leased and unleased areas;

3. To find that the agreed reduced rental value of the unleased area is the sum of \$8,508.00 and that the agreed reduced rental value of the leased area is the sum of \$105,196.00;
4. To conclude that judgment should be rendered awarding the sum of \$19,403.98 to Gawzners and the sum of \$91,023.77¹ to Lebenbaum, and to enter judgment accordingly.

Respectfully submitted,

IRL D. BRETT,

PAUL R. COTÉ,

By IRL D. BRETT,

Attorneys for Appellant Leo Lebenbaum.

¹While the awards would normally be: Gawzners, \$8508.00 and Lebenbaum, \$105,196.00, the Government was entitled to a credit for \$1594.02 which had been paid to Gawzners [R. 264, par. 14] which would reduce their award to \$6903.98, then Lebenbaum had assigned \$12,500.00 of his award to Gawzners as security for his liquor license [R. 60] which would increase Gawzner's award to \$19,403.98. The Government had exercised an offset of \$1672.23 against Lebenbaum [R. 265, par. 20]; this reduced his award to \$103,523.77. His assignment of \$12,500.00 as security for the liquor license [R. 60] reduces his award to \$91,023.77.

APPENDIX I.

Fifth Amendment: "Nor shall private property be taken for public use without just compensation."

First War Powers Act—Act approved August 18, 1890; 26 Stat. 316 (50 U. S. C. 171):

"The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof, or other interest therein, or right pertaining thereto, needed for the * * * location * * * of * * * military training camps * * * such proceedings to be prosecuted in accordance with the laws relating to suits for condemnation of property of the States wherein the proceedings may be instituted * * *."

Second War Powers Act—Act approved March 27, 1942:

"Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such

proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended.”

APPENDIX II.

The following Street Improvement Acts, each of which authorized condemnation proceedings to acquire the necessary rights-of-way and other lands and each of which provided for creation of assessment districts and assessing the cost of the improvements against the lands benefited by the improvement were effective on December 15, 1943:

Street Opening Act of 1889 (Streets and Highways Code Sections 3200-3351);

Assessments: Chapter 4 (Sections 3260-3267), Chapter 5 (Sections 3280-3290);

Condemnation: (Sections 3330-3335).

Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443);

Assessments: Sections 4270-4350;

Condemnation: Sections 4185-4241.

The Improvement Act of 1911 (Streets and Highways Code Sections 5000-6794);

Condemnation: Sections 6120-6123;

Assessments: Sections 5315-5327.

Typical examples of the provisions are the following sections from the Street Opening Act of 1903 (the Act involved in *Pasadena v. Porter*):

Streets & Highways Code Section 4270:

“Diagram of project: Preparation and delivery: Data required to be shown. Upon the entry of the interlocutory judgment, the legislative body shall order the engineer to make and deliver to the street superintendent a diagram of the improvement and of the property within the assessment district described in the ordinance of intention. The

diagram shall show the land to be taken for the proposed improvement, and also each separate lot or parcel of land within the assessment district, and the dimensions of each such lot or parcel of land, and its relative location to the proposed improvement.”

Streets & Highways Code Section 4271:

“Assessment of expenses: Deduction of contribution. If the proceeding is not conducted by a county, the engineer shall deliver the diagram to the street superintendent and shall indorse thereon the date of such delivery. The street superintendent upon receiving the diagram (or, if the proceeding is conducted by a county, the county surveyor or other engineer upon the completion of the diagram) shall proceed to assess the total expense of the proposed improvement against the lands, including the property of any railroad or street railroad, within the assessment district, except the land to be taken for the improvement, in proportion to the benefits to be derived from the improvement. Before the total expense is assessed he shall deduct such percentage or sum as the legislative body has declared by the ordinance of intention that the city shall pay.”

Streets & Highways Code Section 4300:

“Right to demand offset. The owner of any property assessed, who is entitled to compensation under the award made by the interlocutory judgment, may, at any time after the assessment becomes payable, and before the sale of the property for nonpayment thereof, and before the issuance of bonds to represent the assessment, demand of the street superintendent that such assessment, or any number of assessments, be offset against the amount to which he is entitled under the interlocutory judgment.”

APPENDIX III.

[Rep. Tr. p. 127]:

(MR. HEARN.)

In this case we have, as I said before, the rulings of this court that the lease is still in effect. That being the case, we have this situation that Gawzner is still able now, and under the language of this term of this lease, will be able, to look to Lebenbaum for rent in full, and no matter what, if anything, this court may award Gawzner as compensation for what the government may have taken from him, that will not relieve Lebenbaum from the obligation to pay rent to Gawzner, and, if, by any judgment that is rendered in this court, any portion of the award paid by the government for rent is awarded to Gawzner, Lebenbaum will still be liable to Gawzner for rent. I can see no escape from that whatever since the question of rent as between Gawzner and Lebenbaum in this action is not before the court either by pleadings or as the result of the law as we have seen it to be. So that, if there is an award to Gawzner for rent in this case or for some compensation for the use and occupancy of these premises during the period the government was in there, that will still not relieve Lebenbaum. It will not be *res judicata* on the subject of rent as between these two contesting defendants, and Lebenbaum will still be liable. The law in such cases proceeds upon the assumption that the landlord is not injured by not giving him the money directly out of the award; that he has his remedy against the lessee personally, by a personal action, an action *in personam*, to [R. T. 128] recover the rent, which is no worse remedy than he had before the condemnation occurred. He is in no worse position and he still has identically the same remedies that he had before.

A second objection or ground that I have for the objection made is this. We are before your Honor to settle the question of the apportionment of this award as between these two contesting defendants, and I am treating Mr. and Mrs. Gawzner, of course, as being one defendant. It is true, without question, that Mr. Gawzner is entitled to recover the rental value of that portion of the condemned property which lies outside the boundaries of the Miramar Hotel. We don't dispute that. But what we say is that he is not entitled to any portion of the award for use and occupancy of the part included within the hotel because he has his remedy in a personal action against Lebenbaum. But, being before the court on the question of apportionment, we have this question, which reduces itself to one of simple arithmetic, it seems to me. I anticipate that the witness will answer that Mr. Lebenbaum's lease had no value over and above the rent, that is to say, that it had no bonus value. Let's assume for the purpose of our reasoning for a moment that that were true, which I do not admit. If it were true that the lease had no bonus value and if for that reason Lebenbaum were not entitled to any portion of the award for the use and occupancy during the period that the government occupied it, then it [R. T. 129] would not follow from that premise that Gawzner was entitled to it. So what would we do with the rest of the money that is here? The mere fact that one man is not entitled to the money doesn't, of itself, establish the fact that some other person is entitled to it. In a condemnation case, the only person who can recover anything is the one from whom something was taken. Now, what did the government take in this case? It took the temporary use and occupancy of the premises, the Miramar Hotel premises, for a period of time beginning after and ending before the period of Lebenbaum's

lease. From whom did it take the right of use and occupancy? It took it from the man who owned it. Who owned it? Under the law of landlord and tenant, Lebenbaum and Lebenbaum alone owned the right to use and occupy those premises. Mr. Gawzner had the right to go on the premises to inspect them and to inspect Mr. Lebenbaum's books and records, but he had no other right, other than as a member of the general public, to go on the premises. He had no right to participate in running that business, in taking any hand in its operation. He could be excluded from the premises by Lebenbaum if at any time he made himself obnoxious there and had gone beyond the rights that the lease gave him to inspect. So, when we come to decide how we are going to divide this award and we come to decide what was taken and from whom we would take that with respect to the Miramar Hotel, nothing was taken from [R. T. 130] Mr. Gawzner. He had nothing to give the government. But the right of use and occupancy was owned by Lebenbaum to the exclusion of the world, including Gawzner, and was from him only that the government took the temporary right of the use and occupancy and from him only that the government could take it.

No. 12299.

IN THE

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Appellee.

LEO LEBENBAUM,

Appellant,

vs.

PAUL GAWZNER and IRENE GAWZNER,

Appellees.

RESPONDENT LEBENBAUM'S BRIEF.

FILED

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TOPICAL INDEX

PAGE

I.

Opinions below 1

II.

Jurisdiction 2

III.

Statement of the case..... 2

IV.

Gawzners' specifications of alleged error..... 5

Argument 6

I.

The court did not err in refusing to declare the lease, and the compensation from the Government for the use of the leased area, forfeited to Gawzners..... 6

1. The court did not err in refusing to declare the lease forfeited and terminated..... 6

2. The court did not err in refusing to declare the compensation from the government for the use of the leased area forfeited to Gawzners..... 9

II.

The Court did err in the measure of compensation which it applied in awarding the rental compensation..... 10

III.

The Court did not err in ratably reducing the agreed rental apportioned for the unleased area..... 22

IV.

The Court did not err in refusing leave to file portions of Gawzners' proposed cross-complaint..... 23

V.

The Court properly refused to approve the findings submitted by Gawzners..... 23

Conclusion 24

Appendix I. Letter dated April 19, 1947, to Mr. Lebenbaum from Stanley S. Burril.....App. p. 1

Appendix II. Excerpts from Leonard, et al. v. Auto Car Sales & Service Co., 60 N. E. 2d 457, 325 Ill. App. 375.....App. p. 4

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|---|----------------|
| Brooklyn etc. v. New York, 139 F. 2d 1007..... | 19 |
| Cromelin v. United States, 177 F. 2d 275..... | 17 |
| Galvin v. Southern Hotel Corp., 164 F. 2d 791..... | 14, 23 |
| Gluck, etc. v. Baltimore, 81 Md. 315, 32 Atl. 515..... | 11 |
| Goodyear, etc. v. Boston Terminal Co., 176 Mass. 115, 57 N. E. 214 | 9 |
| Hart v. California Pacific T. and T. Co., 136 F. 2d 430..... | 17 |
| John Hancock, etc. v. United States, 155 F. 2d 977..... | 13 |
| Kimball Laundry v. United States, L. Ed. Adv. Opin. 1420.* | 19 |
| Leonard v. Auto Car Sales & Service Co., 325 Ill. App. 375, 60 N. E. 2d 457..... | 15 |
| Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. Ed. 463..... | 19 |
| Montana R. Co. v. Warren, 137 U. S. 348, 34 L. Ed. 681..... | 19 |
| Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526..... | 12, 14, 15, 16 |
| Straszula v. Fargo Estate Trust, 152 F. 2d 61..... | 8 |
| Stratford Co. v. Continental Mtge. Co., 74 Cal. App. 551, 241 Pac. 429..... | 18 |
| United States v. Dunnington, 146 U. S. 338, 36 L. Ed. 996.... | 16 |
| United States v. Improved Premises, etc., 54 Fed. Supp. 469.... | 8 |
| United States v. Land, 57 Fed. Supp. 548..... | 8 |
| United States v. 10,620 Sq. Ft., etc., 62 Fed. Supp. 115..... | 8 |
| United States v. 21,815 Sq. Ft. of Land, etc., 59 Fed. Supp. 219 | 8 |
| United States v. 45,000 Sq. Ft. of Land, etc., 62 Fed. Supp. 121 | 8 |
| United States v. 25,406 Acres of Land, etc., 172 F. 2d 990.... | 19 |

iv.

| | PAGE |
|---|----------|
| United States v. 26,699 Acres of Land, etc., 174 F. 2d 367..... | 14 |
| United States v. Miller, 317 U. S. 369, 87 L. Ed. 336..... | 19 |
| United States v. Petty Motors Company, 327 U. S. 372, 90 L. Ed. 729..... | 8, 9, 12 |

STATUTES

| | |
|--|----|
| United States Constitution, Fifth Amendment..... | 12 |
|--|----|

TEXTBOOKS

| | |
|--|---|
| 18 American Jurisprudence, Sec. 232, p. 866..... | 7 |
|--|---|

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RESPONDENT LEBENBAUM'S BRIEF.

I.

Opinions Below.

The opinions below are correctly described and referred to in Appellant, Lebenbaum's Opening Brief (L.O.B. p. 1).*

*Throughout this brief Lebenbaum's Opening Brief will be indicated as L.O.B.; Gawzner's as G.O.B.; the printed transcript of the record as R., the findings in the judgment appealed from as F., and the conclusions therein as C. The United States will be called Government; the area under Lebenbaum's lease, the leased area, the remainder, the unleased area. Emphasis is supplied unless otherwise noted.

II.

Jurisdiction.

All jurisdictional matters are correctly set forth and referred to in said Opening Brief (L.O.B. p. 2) excepting that no reference was made to Lebenbaum's Cost Bond on Appeal [R. 245-246].

III.

Statement of the Case.

In his opening brief Lebenbaum has given a "Succinct Statement of the Case" (L.O.B. pp. 3-5) and an "Extended Statement" (L.O.B. pp. 5-12). Gawznern include a "Concise Abstract of Case" in their opening brief (G.O.B. pp. 3-6). While that latter is in part accurate, it contains conclusions and omissions which will be hereinafter noted and which, Lebenbaum believes, make his statements the more reliable.

1. The first paragraph in Gawzner's "Concise Abstract" is inaccurate in omitting reference to paragraph Thirteen of the lease [R. 294] which *limited* Lebenbaum's obligations under paragraph Five [R. 285] and Seven [R. 287-290] which are referred to. The trial court noted such limitation [R. 178-179] and gave it proper and necessary consideration in determining that through apportioning to themselves restoration not paid for by the Government [R. 98, 55], *i. e.*, for ordinary wear and tear, appellants Gawzner and Lebenbaum had *reduced* the balance of the *agreed award*, which had been paid into the registry of the Court to a sum *less than* the reasonable rental value of the leased and unleased areas and that, for such reason, the rental compensation for *each area*

must be *ratably reduced* [R. 179-182; 228-232; Fs. 15-22, incl.].

2. While the second paragraph of Gawzner's "Concise Abstract" is technically correct in that it discloses that it is only a *partial* quotation and indicates the omission in a customary format, it is not a *fair* or *accurate abstract*. It omits the very language which *limits* the condemnation clause to *particular condemnations by particular condemnors* [L.O.B. pp. 22-31; R. 291-292].

3. In the first complete paragraph on page 4 of their opening brief, Gawznors state that "Lebenbaum made only limited restoration of the premises." Such statement is not true and there is no supporting evidence in the record!

4. In the paragraph next following, Gawznors state "and Gawznors completed the restoration of all of the property and the repair and replacement of furniture and equipment." Such statement is not true and there is no supporting evidence in the record!

Ordinarily, Lebenbaum would ignore such unwarranted asseverations, since they are without record support, but he departs from such ordinary course, in this brief, for the following reasons:

(a) Throughout this cause Gawznors have contended that the trial court had jurisdiction to bind Lebenbaum under the rule of *res judicata* as to the rights and obliga-

tions of appellants *inter se*—not connected with their several rights *as against the Government*—and it is assumed that they will so assert in this court and in the state court as hereinafter referred to.

(b) In Exhibit B [R. 82-86] annexed to Gawzner's answer to the Third Amended Complaint [R. 72-86], there is contained a paragraph I [R. 84] which requires Lebenbaum to "comply with the terms of the lease."

(c) While this agreement expressly excepts the period which is the subject matter of this appeal [R. 85] Gawznerns have filed an action in the Superior Court of Santa Barbara County, California, entitled "*Paul Gawzner, et al. v. Leo Lebenbaum, et al.*, No. 39518," which is now pending, and in which they allege that Lebenbaum has defaulted in respect to his obligation as to restoration and that they have fully performed. Also, regularly during each month since Lebenbaum was returned to possession by the trial court [R. 16], Gawznerns have written Lebenbaum a letter re-asserting the existence of such alleged default [Appdx. i].

(d) Hence, Lebenbaum does not want this court to assume, by Gawzner's unsupported asseverations and his silence, that such statements are true and, particularly, desires to avoid the possibility that this Court, considering the statements *insignificant and undisputed* details, might inadvertently adopt them in its factual statement in its decision of this cause and thus give Gawznerns an opportunity to cite such statements as *res judicata* in the State suits!

IV.

Gawzners' Specifications of Alleged Error.

Gawzners' Opening Brief contains a veritable *potpourri* of alleged errors by the trial court, consisting of 17 divisions and 8 subdivisions. We will examine each of them to the extent deemed necessary but believe that they can be appropriately grouped into the following summaries:

1. The Court erred because it refused to declare the lease, and the compensation from the Government for the use of the leased area, forfeited to Gawzners (G.O.B. p. 8—points 1 and 2; pp. 13-25).
2. The Court erred in the measure of compensation which it applied in awarding the rental compensation (G.O.B. pp. 8-13—points 4-15; pp. 26-44).
3. The Court erred in ratably reducing the agreed rental apportioned for the unleased area (G.O.B. pp. 9-11—points 5-10; pp. 45-46).
4. The Court erred in refusing leave to file portions of Gawzners' proposed Cross-Complaint (G.O.B. p. 13—point 16; p. 48).
5. The Court erred in not signing the findings submitted by Gawzner (G.O.B. p. 13—point 17).

ARGUMENT.

I.

The Court Did Not Err in Refusing to Declare the Lease, and the Compensation From the Government for the Use of the Leased Area, Forfeited to Gawzners.

1. The Court Did Not Err in Refusing to Declare the Lease Forfeited and Terminated.

The Court did so refuse [R. 234-235; C. 2]. But, as we have already shown in our opening brief (L.O.B. pp. 22-33), such portion of the Court's decision was correct and is supported by the record and the law.

An examination of the argument of Gawzners upon this issue discloses misstatements, misconceptions and the complete ignoring of language in the lease which distinguishes its provisions from those in the cases cited by them and from what is commonly termed a general condemnation clause.

On page 14, Gawzners state:

“No contention was made that the language of the condemnation clause was ambiguous * * *.”
(L.O.B. p. 14.)

The opinions of Judge Hollzer (61 Fed. Supp. 268) and Judge Weinberger [R. 16] refute this misstatement.

Throughout their discussion of paragraph Ten [R. 291] [the condemnation clause] they ignore the limiting words or clauses “such,” “in any such” and the proviso that the condemnation should be one in which *assessments were levied*. In short, they ignore the evident fact that paragraph Ten was limited in its scope to a particular

kind of condemnation proceeding and that, thereby, this *federal* proceeding was excluded!

In such discussion they also ignore the provisions of paragraphs Fourteen [R. 295] and Twenty-two [R. 299] in which the United States *is named* when it is intended that the lease apply to it.

And they also ignore the applicable *California* law which *requires*, if possible, a construction which will avoid the *forfeiture of an estate* (L.O.B. p. 24, and cases cited).

We believe Gawzners have also misconstrued the authorities and decisions which they cite upon this point (G.O.B. pp. 18-25) if they conceive them to be applicable to Paragraph Ten of the Lebenbaum lease. Before analyzing such authorities and decisions, we repeat here the summation set forth in Lebenbaum's opening brief (L.O.B. p. 32):

“Summarizing, we do not dispute that a general condemnation clause may result in a forfeiture of a tenant's right to a condemnation award. We do not dispute that the term ‘other public body’ may be used to include the United States or that it is a ‘public body.’ We do not dispute that the instant case involves an eminent domain proceeding for ‘a public purpose.’ We *do* assert that paragraph Ten is not a general condemnation clause but is a *limited* condemnation provision covering a particular kind of eminent domain proceedings only and that it, manifestly, was never intended to include the United States nor this type of a condemnation proceeding.”

The quotation from 18 Am. Jur. 866, Eminent Domain, Sec. 232 is irrelevant. The *condition* stated therein (G.O.B. p. 18) “*if applicable to the particular case*” is not present in our case.

This, also, eliminates *U. S. v. Petty Motors Company*, 327 U. S. 372, 375, 90 L. Ed. 729, 733 (G.O.B. p. 15) on this point, because the quoted clause expressly included *Federal* takings *by name*.

Likewise, Gawzners' quotations from *U. S. v. Improved Premises, etc.*, 54 Fed. Supp. 469 (G.O.B. p. 19); *U. S. v. 21,815 Sq. Ft. of Land, etc.*, 59 Fed. Supp. 219 (G.O.B. p. 21); *U. S. v. 10620 Sq. Ft. etc.*, 62 Fed. Supp. 115 (G.O.B. p. 23), and *U. S. v. 45,000 Sq. Ft. of Land, etc.*, 62 Fed. Supp. 121 (G.O.B. p. 24) are irrelevant here because each of those decisions construed and applied the provisions of *general condemnation clauses* which contained no language evidencing an intention to limit the type of proceeding or condemning body; nor did any of such decisions treat of a condemnation clause which was capable of several constructions, one of which would avoid a forfeiture; nor did any of them construe a lease *made in California*, whose laws *require* such construction to avoid a forfeiture of an estate if at all possible.

The Gawzner quotations from *U. S. v. Land*, 57 Fed. Supp. 548 (G.O.B. p. 20), and from *Straszula v. Fargo Estate Trust*, 152 F. 2d 61 (G.O.B. p. 22), like their quotation from paragraph Ten (G.O.B. p. 3), are incomplete.

Both of these cases involve a lease made in Massachusetts. The full text of the condemnation clause is reported in the District Court decision (57 Fed. Supp. 549). It contained no word, clause or sentence indicating that it did not apply to *any* condemnation proceeding by *any* condemnor.

To the contrary, it read:

“the said premises, or any part * * * shall be taken * * * by the action of *any* public authorities.”

Massachusetts law requires a strict construction *in favor* of such forfeitures (*Goodyear, etc. v. Boston Terminal Co.*, 176 Mass. 115, 57 N. E. 214). The Court of Appeals for the First Circuit said, in citing the *Goodyear* case, *supra*:

“The law governing appellant’s (lessee’s) claim is the *law of Massachusetts*. Hence in accordance with (that law) the judgment is affirmed.”

Of course, our summation, just requoted, discloses that we take no issue with the general statements of Gawzners that the United States is a “public body” and this proceeding was for a “public purpose” (G.O.B. pp. 24-25).

2. The Court Did Not Err in Refusing to Declare the Compensation From the Government for the Use of the Leased Area Forfeited to Gawzners.

The Court did so refuse [R. 235, C. 4], and we have shown that such ruling was correct (L.O.B. pp. 28-29). To keep this reply within proper bounds we desist from further analysis of the decisions cited by Gawzner, except to requote, with added emphasis, from the *Petty Motors* case (G.O.B. p. 19):

“* * * with *this type* of clause, at least in the *absence of a contrary state rule* * * *.”

Here we have a *different type* of clause and a *strict state rule* of construction *to avoid a forfeiture*, if possible.

Furthermore, Gawzners’ quotation does not even complete the sentence quoted from [G.O.B. p. 24; R. 291].

II.

The Court Did Err in the Measure of Compensation Which It Applied in Awarding the Rental Compensation.

Lebenbaum is in the anomalous situation of agreeing with Gawzners that the trial court erred in fixing and awarding the rental compensation. He, also, finds himself in accord with them that the \$113,704 remaining in the registry represented the *agreed rental* compensation for the leased and unleased areas (L.O.B. pp. 42-44; G.O.B. p. 27).

But, from that point, the positions of the parties are contradictory:

1. Lebenbaum asserts that the court erred because it did not award *all* of the rental for the leased area *to him*. Gawzners, because *they* did not receive the *entire* award. Aside from the factor of forfeiture or assignment which will be controlled by the decision as to point I, *supra*, their controversy lies in the assertion of Lebenbaum that no interest was taken by the Government in the leased area, which was compensable by the Government, except a *portion of Lebenbaum's interest* (L.O.B. pp. 34-39); that, since he continued liable for the contract rent, *he alone* is entitled to the full compensation for such taking *from him* and that such full compensation *includes* the equivalent of the rent he is obligated to pay under his lease (L.O.B. pp. 39-41).

Gawzners assert that, if the lease continues, they, nevertheless, are entitled to receive their rent, as fixed in the lease, as *a part of their compensation from the Government* and, that, absent proof of *bonus value* in Lebenbaum's lease, they are entitled to *all of the rental for the leased area* (G.O.B. pp. 28, 36-37).

We have just referred to the portions of Lebenbaum's Opening Brief which refute Gawzners' contentions. Gawzners overlook the basic reasons why the *tenant only* (i. e., Lebenbaum) *must receive* the equivalent of his obligation to pay rent *to make him whole!*

"If a condemnation of part of the premises will not discharge the tenant's covenant to pay rent, neither will it operate to apportion the rent so as to relieve the tenant of any portion of his liability to the lessor. Apportionment of the rent does not mean abatement of it, because, though rent may be apportioned, the tenant still remains liable to pay the whole of it
* * *

"As the tenant's estate is entirely distinct from the landlord's and as *both* are within the protection of the Constitution, each must be awarded in money an amount equivalent to the value of that which is taken from him and as parts of the premises are taken from (his) possession without thereby releasing him from his covenant to pay the whole rent * * * allowance must necessarily be made for the rent to be paid for (that) of which he is deprived because the obligation of his contract to pay the entire rent is not, and under settled constitutional guarantees cannot be, impaired or abridged by condemnation proceedings which * * * ignore that obligation as an element of substantial injury * * *." (Insertions added.)

Gluck, etc. v. Baltimore, 81 Md. 315, 325, 32 Atl. 515, 516-517.

"* * * The lessee continuing personally liable, but losing his estate and right to its enjoyment, would be entitled to receive *not merely the value of the term, but also* a sum of money equivalent to the present value of the sum of the rents payable *in futuro*, 'that

is, he should receive the value of his term subject to the rent (*i. e.*, the bonus value), *and such further sum as would be considered a present equivalent for the rent thereafter to be paid * * *.*” (Insertions added.)

Pasadena v. Porter, 201 Cal. 381, 387, 257 Pac. 526, 528.

“The court sitting (in eminent domain) *has no power* to reform or revise the lease in question, nor to determine to what extent the covenant to pay rent shall be affected, if at all. The tenant cannot *compel* the landlord to accept a lessened rent. Neither can the landlord *force* a readjustment of the rent.” (Insertions added.)

Pasadena v. Porter, 201 Cal. 381, 388, 257 Pac. 526, 529.

Gawznern rely upon *U. S. v. Petty Motor Company*, 327 U. S. 372, 381, 90 L. Ed. 729, 736 (G.O.B. p. 36) and quote from a statement defining *a* measure of damages:

“The measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant’s term, * * * Less the agreed rent which the tenant would pay for such use and occupancy.”

They ignore the fact that the quoted definition was the *constitutional measure* under the Fifth Amendment (U. S. Rep. 377, L. Ed. 734) for the taking of *all* of the remainder of Petty’s lease:

“The Petty Motor Company held a lease which expired October 31, 1943, with an option for an additional year * * *.” (U. S. Rep. 733, L. Ed. 375);

“The value of the remainder of the term of Petty Motor Company’s lease includes the value of the right to a renewal for a year * * * as well as the value of the period, ending October 31, 1932 * * * (U. S. Rep. 380, L. Ed. 736);

“* * * These facts, we conclude, resulted in the taking by the United States of the temporary use of the building until June 30, 1945, * * *.” (U. S. Rep. 374-375, L. Ed. 733);

“* * * consequently (Petty’s) *rights* under the lease *ended before* those which the Government sought by its petition * * * (U. S. Rep. 375, L. Ed. 733.) (Insertion added);

“U. S. v. General Motors Corp. (323 U. S. 373, 89 L. Ed. 311) was a different case. In it only a *portion* of the lease was taken * * * (U. S. Rep. 379, L. Ed. 735);

“There is a *fundamental difference* between the taking of a *part* of a lease and the taking of the *whole* lease.” (U. S. Rep. 379, L. Ed. 735.)

It was in the light of such *factual determination* and *legal conclusions* that the Supreme Court defined the measure to be applied for taking *all* of Petty’s remaining leasehold estate.

The Supreme Court has never said that the landlord is entitled to share in an award for the taking of a *portion* of the tenant’s term where the tenant remains liable on the lease. Inferentially, at least, it has held to the contrary (Appendix ii).

It is difficult to see where Gawzners get comfort from *John Hancock, etc. v. U. S.*, 155 F. 2d 977, 978 (G.O.B. pp. 37-38). We relied upon it. (L.O.B. pp. 41, 56).

We repeat a portion of Gawzner's quotations, with appropriate emphasis:

"If, after a condemnation, a lessee *remains under obligation* to pay rent, it is entitled to damages equal to the fair rental value of the premises * * *.

"* * * In (U. S. v. General Motors) the tenant was under a *continuing obligation* to pay rent and hence was entitled to the fair rental value *undiminished by the rental under the lease* * * *."

We have shown that such is the California rule (L.O.B. pp. 40-41) and *Pasadena v. Porter, supra*.

Gawznors seem to believe the rule is different if the *tenant is liable for but has not paid* the rent (G.O.B. p. 38). The Court of Appeals says "remains under obligation to pay," not "has paid," the rent. Furthermore, *Lebenbaum did pay* until *Gawznors refused to accept* further rent [R. 226; F. 12, 13; 202; 83; 117, 348-349; 8 par. 1; 11-12].

Gawznors rely on *Galvin v. Southern Hotel Corp.*, 164 F. 2d 791 (G.O.B. pp. 38, 39). That was a *Declaration of Taking* case (L.O.B. p. 53, 154 F. 2d 970, 971), and the Court of Appeals therein held that the tenant had *wilfully defaulted* before the Government condemned and that he had wilfully failed to abide by the conditions which the Court had imposed in 154 F. 2d 970 for relief from his default. Also, it is *contrary to California law*.

In a somewhat *oblique* manner, Gawznors may be relying upon *U. S. v. 26,699 Acres of Land, etc.*, 174 F. 2d 367, from which they quote (G.O.B. p. 44):

"If the lease was cancelled by appellees [lessees], no recovery ought to be had by them, or, if the lease

was merely *suspended* because of the pendency of the condemnation proceedings, any damages to Appellees must be diminished by the annual rent *which they were relieved from paying*, if any.”

It is evident that they misconstrue or ignore the portions we have emphasized. Of course, if the eminent domain proceedings relieved the tenant from paying rent during the period of the taking, which is *not* the rule in California but *is* the rule in some states (*Cf. Pasadena v. Porter*, 201 Cal. 381, 387, 257 Pac. 526, 528), then the lessee would not have that *continuing obligation* and could not *collect for it* from the condemnor.

On pages 36 and 37 of their Opening Brief, Gawzners blandly state:

“* * * In the case at bar if the rental payable by Lebenbaum to Gawzners had been a flat sum of so many dollars per month, it would be readily conceded, we believe, that after determining the amount of restoration the remainder of the compensation recovered from the United States would have been payable first to Gawzners in the amount of such rent reserved by the lease, and the remainder, if any, to Lebenbaum as the bonus value of his lease * * *.”

We ask for authority. We have found none. Instead, as we have shown, the Federal law, the State law and the weight of authority is *just the opposite!* As epitomized in the *Leonard* case (L.O.B. p. 40) 325 Ill. App. 375, 391, 60 N. E. 2d 457, 464:

“Lessor will have no claim * * * *against the Government*, since the Government will not have appropriated any interest of lessor’s in the premises * * *.”

And, of course, the fund represented the *claims against the Government* (L.O.B. p. 51).

Gawzners' contentions on this point require consideration of two other matters:

First, if the present judgment is affirmed, or if any subsequent modification thereof awards to Gawzners any portion of the contract rental for the period of the Government's occupancy of the leased area, Gawzners will have collected from the Government, by judicial decree, moneys which *they could not have collected from the Government*, and which the Government owed to Lebenbaum!

The Government, of course, is protected because it has paid the money into court and it is not concerned with how or to whom it is distributed (*U. S. Dunnington*, 146 U. S. 338, 351, 36 L. Ed. 996, 1001), but Lebenbaum would have *no protection or defense* from a full recovery of the accrued rental under the lease brought in any court of competent jurisdiction. This is necessarily true, because:

(a) under the controlling California law, a taking of a part of a lease does not release, apportion, abate, modify or suspend the full contract liability of the lessee to pay the full accrued rent. (*Pasadena v. Porter, supra.*)

(b) since neither this court nor the trial court has *jurisdiction* in this cause to determine and enforce the rights and obligations of the appellants as between themselves, *as distinct from their rights to collect from the Government* (L.O.B. pp. 49-55) Gawzners could not *confer* such jurisdiction by consent nor be estopped thereby to assert in the later litigation that the decree *must* be construed as a distribution of the eminent domain obliga-

tion running from the Government to them, and, hence, as not affecting or including Lebenbaum's contract liability over which the court rendering the eminent domain judgment had no jurisdiction.

(c) neither this court nor the trial court is an agent of the Government (*Cromelin v. U. S.*, 177 F. 2d 275). Hence, if Gawzners did subsequently collect from Lebenbaum the contract rental under the lease, he would have no way to assert and enforce reimbursement for the moneys which the Government, through the court, had erroneously paid to them.

Second, the record discloses that paragraph Ten of the lease has been construed by two trial judges and that their construction appears to be consistent with the true intent of the parties:

“* * * and where that is the case, the appellate court will not substitute another interpretation, though it seems equally tenable.”

Hart v. California Pacific T. and T. Co. (9th Cir.),
136 F. 2d 430, 432.

2. Lebenbaum asserts that the learned trial judge erred in failing to fix the *agreed* rental value of both areas and in failing to award *all* for the leased area to him and all for the unleased area to Gawzners (L.O.B. p. 45). This could have been done in a number of ways and it was not error for the Court to receive evidence as to market rental value of both areas in order to compare the totals with the agreed rental and to *reduce each ratably*. Such was the Court's obligation in order to construe the stipulation between the parties so 'as to produce *equitable* as distinct

from *inequitable* results. (*Stratford Co. v. Continental Mtge. Co.*, 74 Cal. App. 551, 555, 241 Pac. 429, 431.) But the Court erred when it awarded *part* of the *agreed rental for the leased area* to Gawzners.

Gawzners assert intermediate *errors as to admission of evidence*. Viewed in the light of departures from the agreed values, we agree in part as hereinafter noted, but, viewed as intermediate evidence of market rental value to be used in dividing up the agreed rental, we disagree.

In so far as the intermediate steps of ascertaining market rental value of the leased area were concerned, the Court erred in receiving and failing to strike Gawzners' evidence as to *bonus* value, since *such value* was incompetent, irrelevant and immaterial. It was incompetent because the rental value had been fixed by agreement. Hence, whatever was left after ascertaining and deducting the *agreed* rental for the unleased area was the agreed rental for the leased area, irrespective of what otherwise would have been the constitutional measure of just compensation (L.O.B. p. 44). It was irrelevant because bonus value has no relevancy where the *whole* compensation is due the tenant (L.O.B. p. 56). It was immaterial because it would neither support nor deplete the rental due Lebenbaum as agreed rental for the leased area.

We shall now consider Gawzners' contentions:

(G.O.B., Points 13, 14 and 15, pp. 11-13). A reasonably accurate summary of Exhibits A and B and of Pettegrew's testimony is set forth in portions of Judge Weinberger's opinion of August 25, 1948 [R. 160-162; 172-175] and in Gawzners' Opening Brief (G.O.B. pp. 5, 29-32). The foundation for such testimony had been laid

in the testimony of Gawzners' witnesses, Allen and Frisbie. Allen stated: There was no *similar lease* known to him in or near the vicinity [R. 378-381] and there was no *similar property* of such age nor which had so scattered a layout [R. 378]. Frisbie knew of no *similar lease* or *similar property* [R. 393, 394, 397, 408, 409, 416]. Hotel properties and leases were *scarce* and had reached a peak for earnings [R. 399-400]. He *considered* reports of its earning experience [R. 398], and *conceded that a prospective lessee would have done so* [R. 403-406; 419-422], but *ignored* such matters on advice of Gawzners' counsel [R. 411]. The Court made a finding to such effect [R. 232; F. 26], which is not challenged by Gawzners. We believe the Supreme Court has settled the rule that evidence of past and prospective earnings is admissible where no *real* market exists, where the taking is temporary and affects a *service* property (*U. S. v. Miller*, 317 U. S. 369, 374-375, 87 L. Ed. 336, 342, 343; *Kimball Laundry v. U. S.*, L. Ed. Adv. Opin. 1420. *Cf. Brooklyn etc. v. N. Y.*, 139 F. 2d 1007, 1013; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 37 L. Ed. 463, 468; *Montana R. Co. v. Warren*, 137 U. S. 348, 352, 34 L. Ed. 681).

Pettegrew testified that one method of evaluating hotel leases used in this area is to estimate prospective and ascertain previous, earnings and calculate the number of times of earnings the lease is worth [R. 465].

“Artificial rules of evidence which exclude from consideration matters which men consider in their everyday affairs hinder rather than help in arriving at a just result. * * *.”

U. S. v. 25406 Acres of Land, etc., 172 F. 2d 990, 995.

Gawzners also assert errors in intermediate *findings* by the trial court. We have already shown that the Court was right and Gawzners are wrong as to Specification 4, subdivisions a to h, inclusive (G.O.B. pp. 8-9). As to Finding 17 [R. 227-228], we think the trial court is technically correct on this record but factually incorrect on the true record because the *compensation for time* required for restoration, *i. e., for the period of deprivation of use*, would be *rent* [R. 121]. The short answer is that the finding is immaterial. The parties had *settled* such issues by their stipulation [R. 98] and receipt of such part of the funds [R. 103; 265, par. 22]. The issue as to *what items were included as rent* was immaterial. The parties had *agreed the unpaid balance was rent!* Finding 18 [R. 228] is factually accurate and is supported by the evidence [R. 401, 478, 483].

Finding 19 [R. 228] is also factually accurate and is supported by the evidence. It is material because it supports Findings 20 [R. 230] and 22 [R. 231], and the Court's action in *ratably reducing* the allowance for rent of the unleased area. The record clearly discloses (a) that Lebenbaum was *not* required to make restoration for ordinary wear and tear and damage by the elements. [Paragraph Seventeen, R. 294]; (b) that the amount stipulated [R. 98] and paid [R. 265, par. 22] included such excluded items [R. 435] and (c) there was no segregation of liabilities as between appellants [R. 358-362] and (d) that the stipulated judgment against the Government *did not include compensation for ordinary wear and tear* [R. 55].

Finding 22 [R. 231] is *incorrectly* described by Gawzners (G.O.B. p. 11). The Court does not find that the

sum of \$113,704.00 does not represent a sum which can be found to be the compensation for use. He found that it cannot be found to be the *entire* compensation for the use. This is an accurate finding if it means by the term "entire compensation," the equivalent of *market* rental value. It is erroneous, however, if it means that such sum is not the entire sum which the parties, by agreement, have fixed as the *equivalent of market rental* for the leased and unleased areas. As we have shown (L.O.B. p. 56) this error can be cured without a reversal of the judgment and without further evidence being taken by a simple remand with directions.

Finding 27 [R. 232] is supported by the testimony of Pettegrew [R. 425-435; 448-486] and Exhibits "A" and "B" [R. 310-331]. Also, by that of Frisbie [R. 399-400]. Finding 28 [R. 233] is doubtful because Frisbie testified that the market rental value of the leased area was \$161,500.00 [R. 400]. Gawzners, however, may not complain. They offered *no* evidence as to the market rental value of the leased area and *confined* their evidence to *alleged lack* of bonus value. Having offered no evidence on the issue they may not complain of the Court's finding that none was given. Furthermore, they had *no interest whatever* in the rental paid by the Government for the use of the leased area (L.O.B. pp. 46-48). Their present counsel, Mr. Burrill, once admitted [R. 146]: "There can be no apportionment of a fund that was not recoverable from the condemnor." In other words, if Gawzners could not have collected from the Government for its use of the leased area, they had no right to share in the money which the Government paid into Court *for such use*.

Lebenbaum has complained of the error in Finding 29 [R. 29; L.O.B. p. 45] but ask that it be corrected on remand (L.O.B. p. 56).

Under Specification 4e (G.O.B. p. 9) Gawzners refer to an alleged error of the trial court in failing to award them the *reasonable value* of the use of the leased area. This was not error. They were entitled to their *contract rent* as fixed in the lease *as against Lebenbaum* but were entitled to *nothing for the leased area* as against the Government and, in this case, the trial court could only determine and apportion their claims and Lebenbaum's claim *against the Government!* (L.O.B. pp. 34-41).

III.

The Court Did Not Err in Ratably Reducing the Agreed Rental Apportioned for the Unleased Area.

The evidence disclosed (a) that the market rental value of the leased area was \$161,500 [R. 400; 412]; (b) that that of the unleased area was \$10,950 [R. 382, 395], and the parties agreed that the restoration damage was \$91,296 [R. 98]. These added together total \$263,746. However, the parties had agreed with the Government that \$205,000 represented such items [R. 45]; thus, by agreement, ratably reducing *agreed* value to 77.7% of *market* value. The Court was *right* in making such ratable reduction. Its error was in awarding Gawzners part of the rental award for the leased area.

IV.

The Court Did Not Err in Refusing Leave to File Portions of Gawzners' Proposed Cross-Complaint.

We do not read the *Galvin* case (164 F. 2d 791) to hold that the trial court, in an eminent domain proceeding, has jurisdiction over issues occurring after the period of the taking has expired, but if it does, the Court below did not *retain* such jurisdiction [R. 58; 103-104] and the appellants, by agreement, had eliminated such matters from the award in this case [R. 85]:

“* * * that this agreement shall be effective only for the period subsequent to June 1, 1946, and shall not be construed to have any effect upon the award or the share or shares thereof which said parties are entitled to receive in the above-referred-to action.”

V.

The Court Properly Refused to Approve the Findings Submitted by Gawzners.

That such point is without merit is shown by the fact that Gawzners make no argument in its support. A mere reading of such proposal discloses that the findings by the Court [R. 214] include every proper and material fact which is referred to in the proposed findings.

Conclusion.

It is respectfully submitted that there is no merit to the Specifications of alleged error by appellant, Gawzner, and that this Honorable Court should remand the cause to the trial court with directions:

1. To find that the parties by agreement have fixed the rental compensation for the leased and unleased area, in the sum of \$113,704;
2. To find that such sum by agreement, represents 77.7% of the market rental value of said leased and unleased areas;
3. To find that the agreed reduced rental value of the unleased area is the sum of \$8,508.00 and that the agreed reduced rental value of the leased area is the sum of \$105,196.00;
4. To conclude that judgment should be rendered awarding the sum of \$19,403.98 to Gawznerns and the sum of \$91,023.77¹ to Lebenbaum, and to enter judgment accordingly.

Respectfully submitted.

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By IRL D. BRETT,

Attorneys for Appellant Leo Lebenbaum.

¹While the awards would normally be: Gawzner's \$8508.00 and Lebenbaum, \$105,196.00, the Government was entitled to a credit for \$1594.02 which had been paid to Gawznerns [R. 264, par. 14] which would reduce their award to \$6903.98, then Lebenbaum had assigned \$12,500.00 of his award to Gawznerns as security for his liquor license [R. 60] which would increase Gawzner's award to \$19,403.98. The Government had exercised an offset of \$1672.23 against Lebenbaum [R. 265, par. 20]; this reduced his award to \$103,523.77. His assignment of \$12,500.00 as security for the liquor license [R. 60] reduces his award to \$91,023.77.

APPENDIX I.

HILL, MORGAN & FARRER

Attorneys at Law

1007-1022 Title Guarantee Building

Fifth Street at Hill

Los Angeles 13, California

April 19th, 1947.

Mr. Leo Lebenbaum

Miramar Hotel

Santa Barbara, California

Re: Paul Gawzner, *et al.* vs.

Leo Lebenbaum, *et al*

pending in the Superior

Court State of California

in and for the County of

Santa Barbara—#39518

Dear Mr. Lebenbaum:

I have been instructed by my clients, Mr. and Mrs. Paul Gawzner, to give you the following information in reference to the above litigation.

That on February 24, 1947, said Paul Gawzner and Irene Gawzner caused to be served upon you by registered mail a notice, copy of which notice is marked "Exhibit C" attached to the complaint in the above entitled proceedings, which said notice in substance advised you that you were violating the agreement of July 23, 1946, and that your right to continue the occupancy of said premises was forfeited and terminated and said notice demanded that you surrender the premises therein referred to to said Paul Gawzner and Irene Gawzner and which said notice further demanded that you cease using said premises by

charging rates in excess of that authorized by the Office of Price Administration.

That on March 3, 1947, said Paul Gawzner and Irene Gawzner caused to be served upon you a notice in writing, a true copy of which is marked "Exhibit D" attached to the complaint in the above entitled proceedings, which said notice advised you that you were violating the aforesaid agreement of July 23, 1946, in the particulars set forth in said notice and demanded that you remove from and deliver up to the plaintiffs possession of the premises therein described within three (3) days after service upon you of said notice.

That you have failed to deliver up possession of said premises and continue to remain in possession thereof and, accordingly, the above entitled action in unlawful detainer was commenced and the same was served upon you March 7, 1947, and it is the intention of said Paul Gawzner and Irene Gawzner to continue to prosecute the same.

You are further advised that your check No. 1044 issued March 1, 1947, payable to the order of Paul Gawzner in the amount of \$1500 on the Miramar Hotel account was returned to you under date of March 3, 1947, and received by you on March 5, 1947, and that said check was returned for the reason that you had theretofore been served with notices demanding the return of the possession of the Miramar Hotel for the reason that you were in default under the agreement by which you held the same.

Since you have continued to hold possession of said premises contrary to said notices and contrary to the demands heretofore made upon you and have continued to have the use of said premises, please be advised that your check No. 1059 dated March 10, 1947, payable to the

order of Paul Gawzner in the amount of \$3,815.95, your check No. 1167 dated April 1, 1946, payable to the order of Paul Gawzner in the amount of \$1,500 and your check No. 1244 dated April 10, 1947, in the amount of \$4,228.45 have been credited by said Paul Gawzner and Irene Gawzner against your obligation for the reasonable rental value of said premises while you have retained the same contrary to said notices and against the wish and desire of said Paul Gawzner and Irene Gawzner, such credit, of course, will be conditioned upon said checks being paid by the bank upon which they are drawn at face value.

Please be further advised that these payments are being accepted without any intent or purpose to recognize your right to occupy said premises, nor are they accepted with any intent to condone or waive your claimed defaults, but are accepted and credited solely against your obligation for the reasonable rental value of the use of said premises, which you are exercising contrary to the wish and desires of said Paul Gawzner and Irene Gawzner and contrary to your contractual obligations to them.

Yours very truly,

/s/ STANLEY S. BURRILL,
STANLEY S. BURRILL
of
HILL, MORGAN & FARRER.

SSB:es

Registered Mail

cc—Messrs. Paul R. Cote and
Thos. H. Hearn

cc—Mr. Laselle Thornburgh.

APPENDIX II.

In *Leonard, et al. v. Auto Car Sales & Service Co.*, 60 N. E. 2d 457, 464, 325 Ill. App. 375, 390, the court held:

“Under the 5th amendment to the Constitution of the United States both plaintiffs and defendant are guaranteed just compensation for the taking of whatever interests they have in the demised premises. As in our opinion the lease has not been terminated, defendant (lessee) is guaranteed the right to recover the reasonable value of that portion of its leasehold estate which has been appropriated by the Government in the pending condemnation proceedings in the Federal Court. Plaintiffs (lessors) will have no claim for the reasonable value of the use of the premises against the Government, since the Government will not have appropriated any interest of plaintiffs in the premises * * *.”

The Illinois Supreme Court affirmed and said (64 N. E. 2d 477, 483, 392 Ill. 182, 195):

“We are satisfied that the judgment of the appellate court is right, and it is affirmed.”

Thereafter, the federal Supreme Court denied certiorari (327 U. S. 804, 90 L. Ed. 1029) and denied a rehearing (328 U. S. 878, 90 L. Ed. 1646) on the merits and not because of lack of a federal question.

Since the right of the lessor to share in the condemnation award was the *sole federal question* raised or discussed in the lower court decisions, the federal Supreme Court must be deemed to have found no error therein.

No. 12299

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, etc., *et al.*,

Defendants,

PAUL GAWZNER and IRENE GAWZNER,

Appellants and Cross-Appellees,

vs.

LEO LEBENBAUM,

Cross-Appellant and Appellee.

**ANSWERING BRIEF FOR CROSS-APPELLEES
PAUL GAWZNER AND IRENE GAWZNER.**

HILL, MORGAN & FARRER and
STANLEY S. BURRILL,

1007 Title Guarantee Building, Los Angeles 13,
*Attorneys for Cross-Appellees Paul Gawzner and
Irene Gawzner.*

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TOPICAL INDEX

PAGE

| | |
|-----------------------------|---|
| Preliminary statement | 1 |
| Argument | 3 |

I.

| | |
|--|---|
| That the condemnation clause determines all issues in the case and requires the payment of the entire award to Gawzners and the cancellation of the lease is practically conceded by appellant Lebenbaum in his brief..... | 3 |
|--|---|

II.

| | |
|---|----|
| A. The contention of appellant Lebenbaum that he is entitled to the entire condemnation award (except for the unleased area) is unsound. Lebenbaum had paid no rent during the period the United States occupied the property. The court, therefore, had jurisdiction to pay the reasonable rental value to the landlord (Gawzners) where the undisputed testimony showed there was no bonus value in the lease and no property was taken from the tenant (Lebenbaum) | 9 |
| B. The contention that the court failed to find separately the value of the use of the unleased area is not true..... | 18 |
| C. The contention made that the court should have excluded Gawzners from participation in the trial except as to the unleased area is moot..... | 19 |

III.

| | |
|--|----|
| The District Court having jurisdiction of the parties and the funds on deposit in the registry of the court should have distributed the entire award to Gawzners. Such distribution would have been in accordance with established principles of law and the undisputed evidence. The distribution based on some ratio of fair market rental value for the property taken and prospective profits of lessee was error..... | 20 |
| Conclusion | 23 |

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|---|--------|
| Albrecht v. United States, 329 U. S. 599, 91 L. Ed. 532..... | 16 |
| Danforth v. United States, 308 U. S. 271, 84 L. Ed. 240..... | 16 |
| Galvin v. Southern Hotel Corporation, 164 F. 2d 791..... | 14, 22 |
| Gluck v. Baltimore, 81 Md. 315, 32 Atl. 515..... | 14 |
| Hopkins v. McClure, 148 F. 2d 67..... | 13 |
| James Alexander Inc. v. United States, 128 F. 2d 82..... | 13 |
| John Hancock Mutual Life Insurance Company v. United States, 155 F. 2d 977..... | 22 |
| Leonard v. Auto Car Sales and Service Co., 392 Ill. 182, 64 N. E. 2d 477..... | 14, 15 |
| Oliver v. United States, 156 F. 2d 281..... | 14 |
| Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526..... | 14, 15 |
| Silberman v. United States, 131 F. 2d 715..... | 12 |
| United States v. General Motors, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R. 390..... | 8, 22 |
| United States v. Improved Premises, etc., 54 Fed. Supp. 469.... | 5 |
| United States v. Land, 57 Fed. Supp. 548..... | 5 |
| United States v. Certain Parcels of Land, 40 Fed. Supp. 436.... | 13 |
| United States v. 1.87 Acres of Land, 155 F. 2d 113..... | 13 |
| United States v. 21 Acres of Land, 61 Fed. Supp. 268..... | 8 |
| United States v. 53.25 Acres of Land, 47 Fed. Supp. 887..... | 12 |
| United States v. 150.29 Acres of Land, 47 Fed. Supp. 371..... | 13 |
| United States v. Miller, 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336 | 9 |
| United States v. Parcel of Land, 54 Fed. Supp. 901..... | 13 |
| United States v. Petty Motors Company, 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729..... | 5, 22 |
| Wachovia Bank v. United States, 98 F. 2d 609..... | 16 |

STATUTES

PAGE

| | |
|--|--------|
| Code of Civil Procedure, Sec. 1244..... | 10 |
| Code of Civil Procedure, Sec. 1246..... | 10 |
| Code of Civil Procedure, Sec. 1246.1..... | 10, 15 |
| Code of Civil Procedure, Sec. 1247..... | 10 |
| United States Constitution, Fifth Amendment..... | 17 |

TEXTBOOKS

| | |
|--|----|
| 12 American Jurisprudence, Sec. 28, p. 749..... | 4 |
| 18 American Jurisprudence, Sec. 321, p. 964..... | 12 |

No. 12299

IN THE

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Appellants and Cross-Appellees,

vs.

LEO LEBENBAUM,

Cross-Appellant and Appellee.

ANSWERING BRIEF FOR CROSS-APPELLEES
PAUL GAWZNER AND IRENE GAWZNER.

Preliminary Statement.

We respectfully submit that an attempt to follow the myriad arguments made by appellant Lebenbaum in his opening brief would only cause a repetition of the confusing elements that entered into the cause in the Court below. Actually the issues in the case at bar are simple.

Eliminating the side issues and ramifications the basic elements consist of but three points, *i. e.*,

1. DOES NOT THE CONDEMNATION CLAUSE IN THE LEASE REQUIRE THE PAYMENT OF ALL REMAINING FUNDS IN THE CASE AT BAR TO THE OWNERS GAWZNERS AND REQUIRE THE CANCELLATION OF THE LEASE?

or if the condemnation clause does not control

2. WHERE THE TENANT HAS PAID NO RENTAL DURING THE PERIOD OF TAKING BY THE UNITED STATES, IS NOT THE LANDLORD ENTITLED TO THE REASONABLE RENTAL VALUE FIXED BY THE JUDGMENT IN CONDEMNATION WHERE THE EVIDENCE SHOWS THERE WAS NO BONUS VALUE IN THE LEASE?
3. WAS IT NOT ERROR FOR THE DISTRICT COURT TO DIVIDE THE AWARD UPON SOME RATIO OF THE PROSPECTIVE PROFITS OF THE TENANT AND RENTAL PAYABLE TO THE LANDLORD?

It is with these three primary issues in mind that we respond to appellant Lebenbaum's brief.

ARGUMENT.

I.

That the Condemnation Clause Determines All Issues in the Case and Requires the Payment of the Entire Award to Gawzners and the Cancellation of the Lease Is Practically Conceded by Appellant Lebenbaum in His Brief.

On page 32 of appellant Lebenbaum's brief at the conclusion of the argument on the condemnation clause,* this concession is made.

"Summarizing, we do not dispute that a general condemnation clause may result in a forfeiture of a tenant's right to a condemnation award. We do not dispute that the term 'other public body' may be used to include the United States or that it is a 'public

*For the Court's convenience the condemnation clause of the lease is again set forth:

"Ten: Condemnation. The Lessee has heretofore been informed and knows that the State of California has heretofore acquired from Lessors, by deed recorded in Book 552, Page 275, Official Records of Santa Barbara County, California, and is the owner of a strip of land adjoining U. S. Highway 101 which is presently being used by Lessors for hotel purposes but which may ultimately be put to highway uses by the State of California. In the event the State of California or the County of Santa Barbara or any other public body shall by condemnation acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any such condemnation suit shall belong solely to the Lessors, but Lessors shall pay any and all assessments levied in any such condemnation proceedings. In the event any such condemnation suit shall include any buildings upon said leased premises, said Lessors, at their sole cost and expense, shall relocate the same upon said leased premises in some place mutually agreeable. Further in this connection, should the effect of such condemnation be such as to reduce the rentable rooms in said hotel by fifty (50) per cent, or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other."

body.' We do not dispute that the instant case involves an eminent domain proceeding for 'a public purpose.' ”

In view of this concession we submit that the strained argument that the condemnation clause does not apply in the case at bar needs but short answer.

In appellant Lebenbaum's brief in this Court and in the arguments made to the District Court much has been made of the equities involved. It is contended that it would be more equitable to all parties to hold that the plain language of this condemnation clause did not apply to the case at bar, because if the lease was cancelled Lebenbaum would lose his lease and in addition would lose the use of the \$20,000 which he had put up at the time of executing the lease for certain improvements to the property [see paragraph Six of the Lease R. 285]. This same alleged inequity would have resulted from a condemnation action that met the terms of the condemnation clause even under the strained construction contended for by Lebenbaum.

The plain language of the lease cannot be ignored nor the lease rewritten by the Court because of claimed inequities in enforcing the contract. This general rule is stated in 12 *Am. Jur.* 749, Contracts, Section 228, where it is said:

“Interpretation of an agreement does not include its modification or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. * * * Courts

cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties.”

The decisions are uniform that a condemnation clause in a lease results in the tenant being unable to share in a condemnation award.

United States v. Petty Motors Company, 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729;

United States v. Improved Premises, etc., 54 F. Supp. 469;

United States v. Land, 57 F. Supp. 548.

For other cases see opening brief on behalf of appellants Paul Gawzner and Irene Gawzner.

In the brief to this Court counsel for Lebenbaum have for the first time openly contended that all Lebenbaum is obligated to pay Gawznern for the period the United States occupied the property is the sum of \$1500 per month, or a total of \$34,000 ($\$1500 \times 22\text{-}2/3$ months), when during the operation of the hotel Lebenbaum was paying an average of \$5,000 per month for the use of the same property under the terms of the lease [R. 433 and 434]. Apparently counsel did not realize the inconsistency of the arguments on the equities involved. The lease requires the hotel, cafe and bar to be continuously operated [R. 281]; the rental payable under the lease is based upon the gross receipts from such operations [R. 281 and 282];

the lease is subject to cancellation if a condemnation proceeding reduces the rentable rooms by fifty per cent or precludes the use of the beach [R. 291 and 292]; the within proceedings prevented the use of the beach and eliminated the possibility of renting any of the rooms or selling any food or liquor.

In spite of these facts counsel argue that the condemnation clause should not be applied because it is not equitable to the tenant but contends it is perfectly equitable to the landlord (Gawzners) to eliminate the operation of the hotel, cafe and bar, destroy the basis upon which the rental was fixed in the lease and to permit the tenant (Lebenbaum) to collect from the United States a sum in excess of \$100,000 as the stipulated reasonable rental value of the premises under lease for the period of the taking and to pay the owner of those premises the sum of \$34,000 for the same period. (The funds remaining after deducting the agreed sum for restoration is the amount of \$113,704. If we deduct from that sum the amount of \$10,500 found by the Court to be the value of use of the area not covered by the lease [Findings 23 and 24, R. 232] there remains the sum of \$103,204 as compensation for the use of the property under lease.)

This contention is made in spite of the fact that the undisputed evidence shows that there was no bonus value in the lease and that Lebenbaum owned no property which was taken by the United States. This argument, if adopted, would permit Lebenbaum to receive a sum of ap-

proximately \$70,000 though no property was taken from him and he was subjected to no expenses during the period the United States occupied the property. It would pay to the Gawzners the sum of \$34,000 for the use of the hotel, grounds, furniture and equipment worth several hundred thousand dollars and on which Gawzners were required to pay taxes and insurance while the United States was in possession. When it is recalled that the rental under the lease for the *six months prior to the taking was approximately \$30,000 and under the contentions advanced by Lebenbaum, Gawzners would receive only \$34,000 for 22-2/3 months*, it is apparent that any equities which might be considered by the Court in interpreting the condemnation clause would be on the side of the landlord rather than that of the tenant.

Again we say that a decision such as contended for by Lebenbaum would not only be inequitable to Gawzners but we contend that the mere statement of the argument is its refutation.

We respectfully ask this question. *For what property or property right is Lebenbaum to be paid nearly \$70,000?*

The undisputed evidence shows he has paid no rent during the period the United States had possession [R. 422]. The Court so found [Finding 13, R. 226]. No property was taken from Lebenbaum. Gawzners owned all the real property, the buildings, the furniture, fixtures and equipment of the hotel [R. 354]. The undisputed evidence shows the lease had no bonus value [R. 377 and

393]. The law does not authorize payment for loss of business, prospective profits or good will (*United States v. General Motors*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, 156 A. L. R. 390). Is Lebenbaum to receive approximately \$70,000 as a result of some legal mesmerism, while Gawzners, who owned the property which was taken by the United States, receives but a third or fourth of the reasonable rental value of the use of the property acquired?

Had Lenbenbaum ever advanced this full argument in the District Court we have no doubt that the decision of the late Honorable Harry A. Hollzer (made on the pre-trial hearing, *United States v. 21 Acres of Land*, 61 F. Supp. 268) would have been different.

The contentions made by appellant Lebenbaum are but proof that the condemnation clause of the lease applies and was meant by the parties to apply to a situation such as is presented by the case at bar.

It must be obvious that the condemnation clause of the lease was inserted therein to avoid just such unreasonable contentions on the part of the lessee as are advanced in this case. We respectfully submit that a contention which would give the lessee nearly \$70,000 when no property was taken from him and the lessor but \$34,000 for the use of the property taken would make a mockery of the law of just compensation and the decisions of the courts.

II.

A. The Contention of Appellant Lebenbaum That He Is Entitled to the Entire Condemnation Award (Except for the Unleased Area) Is Unsound. Lebenbaum Had Paid No Rent During the Period the United States Occupied the Property. The Court, Therefore, Had Jurisdiction to Pay the Reasonable Rental Value to the Landlord (Gawzners) Where the Undisputed Testimony Showed There Was No Bonus Value in the Lease and No Property Was Taken From the Tenant (Lebenbaum).

The appellant Lebenbaum strenuously contended in the court below and is still contending here that except for the area owned by Gawzners and not covered by the lease that Gawzners were not entitled to any portion of the award, were not entitled to appear in the case and that the District Court had no jurisdiction to apportion the award and that the District Court should distribute the entire award (except for the unleased area) to Lebenbaum, and that Lebenbaum and Gawzners should then be relegated to some other court to determine the rent due under the lease.

It is respectfully submitted that such is not the law either under the California Statutes relative to condemnation proceedings or the rules in Federal condemnation cases.

In a condemnation proceeding instituted by the United States in a Federal Court, the Court is required to adopt the forms and method of procedure afforded by the law of the state in which the Court sits.

United States v. Miller, 317 U. S. 369, 63 S. Ct. 276, 87 L. Ed. 336.

*Section 1244 C. C. P.** provides in part as follows:

“The complaint must contain: * * * 2. The names of all owners and claimants, of the property, if known, or a statement that they are unknown, who must be styled defendants;”

Section 1246 C. C. P. provides in part as follows:

“All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead, and defend, each in respect to his own property or interest, or that claimed by him, in like manner as if named in the complaint.”

Section 1246.1 C. C. P. provides in part as follows:

“Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined as between plaintiff and all defendants claiming any interest therein; thereafter in the same proceeding the respective rights of such defendants in and to the award shall be determined by the court, jury, or referee and the award apportioned accordingly.”

Section 1247 C. C. P. provides in part as follows:

“The court shall have power: * * * 2. To hear and determine all adverse or conflicting claims to the property sought to be condemned and to the damages therefor;”

*References to the Code of Civil Procedure of the State of California are made by the abbreviation of “C. C. P.”

In the case at bar the Third Amended Complaint in Condemnation, upon which the main case went to trial, named as defendants Paul Gawzner, Irene Gawzner and Leo Lebenbaum designating Paul Gawzner and Irene Gawzner as presumptive owners of the property [R. 42]. Prior to the commencement of the trial of the main condemnation proceeding counsel for the Government exercised the option pursuant to the provisions of Section 1246.1 C. C. P. to try the case as against all defendants [R. 130]. The Stipulation for Judgment in the main condemnation proceeding which fixed the compensation to be paid by the United States for the taking and for restoration provided in part as follows [R. 51]:

“That this Court shall retain jurisdiction to determine the amount of the interests of all parties who have appeared in this proceeding, and who may hereafter appear herein, if any, in and to the compensation which shall be ordered paid by the plaintiff in the judgment to be filed pursuant to this Stipulation, the same as though a jury had rendered a verdict for said sum of \$205,000, without interest, as their total award for all interests taken by the plaintiff in this proceeding, and for full satisfaction of all claims for damages against the United States arising from such taking, * * *

The Judgment in Condemnation entered pursuant to said stipulation contained the same provisions [R. 58].

Thus it will be seen that by the statutes of California and by the stipulations of the parties the District Court had jurisdiction of the Gawznors as owners of the property, of Lebenbaum as lessee of the property, of the funds deposited in the Registry of the Court in payment of the just compensation for the taking and the restoration, and

jurisdiction to apportion that award among the parties entitled thereto.

That this is the proper procedure in condemnation proceedings has been frequently recognized by the Federal Courts and other authorities.

18 *Am. Jur.* 964, Eminent Domain, Section 321 :

“The term ‘owner’, when employed in statutes relating to eminent domain to designate the persons who are to be made parties to the proceeding, refers, as is the rule in respect to those entitled to compensation, to all those who have any lawful interest in the property to be condemned.”

In *Silberman v. United States*, 131 F. 2d 715, the court states at page 717 :

“Upon condemnation the condemnor is vested with a complete title and all interests in the property taken are extinguished. *A. W. Duckett & Co., Inc., v. United States*, 1924, 266 U. S. 149, 45 S. Ct. 38, 69 L. Ed. 216; *United States v. Dunnington*, 1892, 146 U. S. 338, 13 S. Ct. 79, 36 L. Ed. 996. All persons having any interest in the property taken are necessary parties to the condemnation proceedings. See 2 *Lewis, Eminent Domain*, 3rd Ed., 1909, Sec. 515, page 935.”

In *United States v. 53.25 Acres of Land*, 47 F. Supp. 887, the court said at page 889 :

“The proceeding for the taking of the above described land having been held before this Court, jurisdiction vests properly in it to make such further orders, judgments or decrees as it may deem necessary.”

Probably the most concise statement of the rule appears in the case of *Hopkins v. McClure*, C. C. A. 10th, 148 F. 2d 67, where the court said at page 70:

“The declaration of taking; the deposit of the estimated just compensation in the registry of the court; the fixing of title (Second War Powers Act, 1942, 56 Stat. 177, 50 U. S. C. A. Appendix, §632, and 40 U. S. C. A. §258a); the determination of just compensation in accordance with state procedure (66 O. S. A. §§53 to 60 inclusive) as directed by Federal law (36 Stat. 1167, 40 U. S. C. A. §258), and the ultimate distribution of the just compensation to those determined to be legally entitled thereto is one continuous integrated process of litigation. See *Catlin v. United States*, 65 S. Ct. 631; *United States v. 17,280 Acres of Land, etc.*, D. C., 47 F. Supp. 267.”

To the same effect see:

United States v. Parcel of Land, 54 F. Supp. 901;

United States v. 150.29 Acres of Land, 47 F. Supp. 371;

United States v. Certain Parcels of Land, 40 F. Supp. 436;

James Alexander Inc. v. United States, 128 F. 2d 82 (Head Note 6);

United States v. 1.87 Acres of Land, C. C. A. 3rd, 155 F. 2d 113.

It is true that in the case at bar there was no declaration of taking but funds were deposited into the Registry of the Court during the period of the occupancy by the United States and after the entry of the Judgment in Condemnation [R. 2, 264 and 265]. Whether the funds were deposited in the Registry of the Court under the declaration

of taking statute, the Second War Powers Act or in payment of the Judgment in Condemnation is not material. As was stated in the recent case of *Oliver v. United States*, C. C. A. 8th, 156 F. 2d 281 at 283:

“A federal court having acquired possession of a fund in the course of a proceeding within its jurisdiction also has jurisdiction of the conflicting claims to ownership of the fund, regardless of the citizenship of the claimants.”

See also *Galvin v. Southern Hotel Corporation* (1947 C. C. A. 4th), 164 F. 2d 791, which approved the same rule where the facts were very similar to the case at bar.

These statutes and decisions are, we respectfully submit, a complete answer to the contentions made by Lebenbaum that the Court lacked jurisdiction to apportion the award.

In the opening brief of appellant Lebenbaum this jurisdiction of the Court is attacked in various manners, first, by contending that since the lower court had held the lease was not cancelled that it was only the interest of the tenant that was condemned relying principally upon the cases of *Pasadena v. Porter*, 201 Cal. 381, 257 Pac. 526; *Gluck v. Baltimore*, 81 Md. 315, 32 Atl. 515; and *Leonard v. Auto Car Sales and Service Co.*, 392 Ill. 182, 64 N. E. 2d 477. It is respectfully submitted that none of these cases are in point.

The case of *Pasadena v. Porter*, which in turn relies primarily upon the decision of *Gluck v. Baltimore*, involved condemnation proceedings where only a portion of leased premises was taken for the opening of a street and the primary question involved was whether or not the tenant

was required to continue to pay the specified rent for the entire premises during the balance of the term and, therefore, entitled to an award for the rental value of the condemned portion, or whether the rental for the balance of the term would be prorated to the remaining area not taken and the landlord be entitled to the entire award for the portion condemned. It must also be remembered that the case of *Pasadena v. Porter* was decided in June, 1927, at which time Section 1246.1 C. C. P. was not in effect. Section 1246.1 C. C. P. was first adopted in 1939. It is respectfully submitted that had Section 1246.1 C. C. P. been in effect at the time of the *Porter* case a different decision might have resulted. See the dissenting opinion in said case.

The case of *Leonard v. Auto Car Sales & Service Co.*, is clearly distinguishable. In that action there was a long term lease with a fixed annual rental. The government took a temporary use of the premises. There was no condemnation clause in the lease. The tenant having failed to pay rent during the government's occupancy the landlord brought suit for the rent and the court held that the tenant was required to pay the flat rent during the period of the government's occupancy and that the condemnation proceeding did not terminate the lease.

Lebenbaum's second contention is based upon the claim that by stipulating to the amount of the just compensation the parties had abandoned the measure of damages fixed by the Fifth Amendment. We respectfully submit that such is not the case and that the authorities cited (*Albrecht*

v. United States, 329 U. S. 599, 91 L. Ed. 532; *Danforth v. United States*, 308 U. S. 271, 84 L. Ed. 240; *Wachovia Bank v. United States*, 98 F. 2d 609) to support the contention are not in point.

The main condemnation action between the United States on the one hand and Gawzners and Lebenbaum on the other hand commenced October 23, 1946 [R. 139] after counsel for the United States elected to require all defendants to litigate their claims jointly [R. 130]. The jury was excused from time to time while arguments were carried on and briefs were being submitted. The parties were likewise carrying on negotiations to settle the amount of compensation to be treated between the defendants (Gawzners and Lebenbaum) as if the sum agreed upon was a verdict of the jury [R. 142].

Ultimately a settlement was made between the United States on the one hand and Gawzners and Lebenbaum on the other hand. This settlement was set forth in a written stipulation [R. 45]. That entire stipulation is based upon the theory expressed therein that the sum of \$205,000 was the fair, just, and adequate compensation for the estate condemned and failure to restore the premises [R. 47]. It was stipulated that if competent witnesses were sworn their testimony would be that the sum of \$205,000 constituted fair, just and adequate compensation for the taking of the interests condemned and failure to restore the premises [R. 49]. It was also stipulated a judgment should be entered providing for a decree in condemnation incorporating the terms of the stipulation [R. 46]. The

stipulation provided that the Court should retain jurisdiction to distribute the award the same as though a jury had rendered a verdict for said sum of \$205,000 [R. 51].

The Court made and entered a judgment and decree in condemnation on the strength of that stipulation [R. 53], which incorporated the provision that jurisdiction was retained to apportion the award [R. 58].

In view of these unquestioned facts that the entire stipulation and judgment were set forth in the direct language of the Fifth Amendment in a proceeding instituted pursuant to that Amendment, we are frank to say we do not see how it can be argued that the parties abandoned the measure of damages fixed by the Fifth Amendment.

This argument has been advanced for the first time in Lebenbaum's opening brief. In view of the fact that the contention is contrary to the stipulations executed by Lebenbaum, we do not believe it merits much consideration. Nor do we see the force of the argument unless counsel are contending that *by agreeing to just compensation* the same as though a verdict had been rendered for the amount they can somehow escape the unquestioned law relating to distribution of an award fixed by a jury or court.

We submit that if such is the purpose of the argument, it is a species of legalistic legerdemain we do not comprehend. To carry such argument to its logical conclusion would penalize parties for settling litigation and reward them for insisting upon a trial. Apparently counsel con-

cede that if a jury had awarded a verdict after trial for the sum of \$205,000 as just compensation for the taking and failure to restore, the Court would have retained jurisdiction to apportion the award in accordance with established legal principles, but because the facts were stipulated the Court lost jurisdiction to do that which Lebenbaum stipulated the Court could do.

B. The Contention That the Court Failed to Find Separately the Value of the Use of the Unleased Area Is Not True.

The Court specifically found the value of the unleased area.

Finding 23 [R. 232] provides as follows:

“That the fair market rental value for the occupancy of the upper portion of said garage during the period beginning July 10, 1944 and ending June 1, 1946, is the sum of \$4412.00.”

Finding 24 [R. 232] provides as follows:

“That the fair market rental value for the occupancy of the land not under lease during the period beginning July 10, 1944, and ending June 1, 1946, is the sum of \$6088.00.”

The two areas described in Findings 23 and 24 were *not* included in the lease [R. 373, 382, 395].

The total of the amounts set forth in Findings 23 and 24 is the sum of \$10,500. True the testimony of the witnesses Allen and Frisbie produced by Gawzners fixed the

values of these two areas at \$10,950 [R. 382 and 395]. We assume, however, that the Court inadvertently thought the testimony was \$10,500 for that figure appears at least twice in the Court's Memorandum of Conclusions [see R. 160 and 162]. Counsel for Lebenbaum conceded this was the fair rental value of such areas [R. 444 and 162].

It would be impossible to more definitely find the fair market rental value of the unleased area. What counsel are really complaining about is that the Court after making such specific findings did not limit the judgment in favor of Gawzners to that amount, or some lesser sum, and award the balance of the funds to Lebenbaum.

C. The Contention Made That the Court Should Have Excluded Gawzners From Participation in the Trial Except as to the Unleased Area Is Moot.

The only motions made to exclude Gawzners from participation in the trial were advanced in the main condemnation action. The Court denied the motions. Both Gawzners and Lebenbaum proceeded to trial against the United States. Thereafter Lebenbaum joined in the stipulation for a judgment in condemnation [R. 45] and by said stipulation consented that the Court should determine the interests of all parties who had appeared in the action (Gawzners and Lebenbaum) in and to the compensation the same as though a jury had rendered a verdict for said sum of \$205,000 for the interests taken and for failure to restore. Such stipulation made moot the motions to exclude Gawzners from the main trial.

III.

The District Court Having Jurisdiction of the Parties and the Funds on Deposit in the Registry of the Court Should Have Distributed the Entire Award to Gawzners. Such Distribution Would Have Been in Accordance With Established Principles of Law and the Undisputed Evidence. The Distribution Based on Some Ratio of Fair Market Rental Value for the Property Taken and Prospective Profits of Lessee Was Error.

It is, of course, contended by Gawzners that under Paragraph Ten of the lease (the condemnation clause) all of the award in the case at bar should have been paid to them. *First*, because the clause so provided and, *second*, because the clause required the Court to find the lease had been cancelled by the giving of the Notice of Cancellation by Gawzners and consequently Lebenbaum had no right to share in the condemnation award. A decision on either of these points would have disposed of the problems of this case.

However, if we assume that the condemnation clause does not apply in the instant case, *we contend that the Court should have distributed the entire remaining fund to Gawzners.*

On more than one occasion in Lebenbaum's opening brief it is stated that Gawzners refused to accept rent while the United States was in possession or otherwise the rent would have been paid. It is true the Court so found [Finding 13, R. 226]. We respectfully contend there is no evidence in the record of such a fact or evidence to support such a finding.

The fact is that Lebenbaum never tendered any rent until after possession was returned to him by the United

States at the expiration of the taking. That tender was for the subsequent period of operation of the hotel.

The evidence is that Gawzners were paid no rent while the Government was in possession [R. 422 and 423—Finding 13, R. 226].

In fact Lebenbaum was very careful to contend throughout the trial that he was entitled to the full award, except for the unleased area; that the Court had no jurisdiction to fix rent between the parties; and that the parties were relegated to some other forum to have the rent payable by Lebenbaum determined. Lebenbaum never tendered any rent for the simple reason that there was no basis in the lease upon which to determine the rent due. If the lease was not in fact cancelled, the rent payable to Gawzners for the period the United States was in possession *must have been the reasonable rental value of the premises*. That was the very matter which was in dispute with the United States in the main condemnation case.

We respectfully submit that where the tenant has paid no rent and both the landlord and tenant are before the Court it is the plain duty of the Court to determine the rights of both parties and distribute the award accordingly. *That is unquestionably the law as has been pointed out under Part II of this brief and the opening brief filed on behalf of appellants Gawzner.*

Counsel for Lebenbaum have tacitly so admitted in their opening brief. *They contend the Court should not have attempted an equitable distribution based on the reasonable rental value of the premises and the prospective profits of the lessee.*

The uniform rule established by the Courts requires the distribution of the award to Gawzners, the lessors, where

the undisputed evidence shows Lebenbaum, the lessee, had paid no rent during the period the United States was in possession and that his lease had no bonus value.

United States v. Petty Motors Company, 327 U. S. 372, 66 S. Ct. 596, 90 L. Ed. 729;

John Hancock Mutual Life Insurance Company v. United States (1946 C. C. A. 1st), 155 F. 2d 977;

Galvin v. Southern Hotel Corporation (1947 C. C. A. 4th), 164 F. 2d 791.

This contention is treated in detail in the opening brief filed on behalf of appellants Gawzner and we respectfully refer the Court to that brief for a more comprehensive statement of the matter.

Contrary to the contention of Lebenbaum (Lebenbaum Brief p. 56) the "bonus value" theory is adopted by the Courts in *all* cases except where the tenant has *actually* paid the rent called for by the lease to the landlord during the period of taking. A careful examination of the cases cited by Lebenbaum will so disclose.

United States v. General Motors Corp., 323 U. S. 373, 382, 89 L. Ed. 311, 320;

United States v. Petty Motor Co., 327 U. S. 372, 378, 381, 90 L. Ed. 729, 734, 736;

John Hancock Mut. Life Ins. Co. v. United States, 155 F. 2d 977, 978.

See also:

Galvin v. Southern Hotel Corporation (1947 C. C. A. 4th), 164 F. 2d 791.

Of course, if the tenant has paid his rent under the lease during the entire period of taking he would be entitled to the entire award. Here the tenant has paid no rent yet claims the entire award.

Conclusion.

We respectfully submit that the contentions made by appellant Lebenbaum are neither sound in law nor just in equity, and that he has not established a single compensable right which has been taken from him, nor has he established one cent of compensable damage. The only evidence in the case indicates he might have suffered a loss of prospective profits. Yet he seeks to have this Honorable Court distribute to him either the whole award or a handsome profit at the expense of the owner (Gawzners) whose property was actually used by the United States.

We again respectfully contend that the record before this Court is sufficiently complete that the cause should be remanded to the District Court with instructions to enter judgment for Paul Gawzner and Irene Gawzner directing that the balance of the funds in the Registry of the Court should be distributed to them and decreeing that the lease be cancelled and that Lebenbaum is entitled to no portion of the award and directing him to deliver up possession of the premises.

Respectfully submitted,

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STANLEY S. BURRILL,

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*Attorneys for Cross-Appellees Paul Gawzner and
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No. 12299.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, etc., *et al.*,

Defendants.

PAUL GAWZNER and IRENE GAWZNER,

Appellants and Cross-Appellees,

vs.

LEO LEBENBAUM,

Cross-Appellant and Appellee.

REPLY BRIEF FOR APPELLANTS PAUL
GAWZNER AND IRENE GAWZNER.

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TOPICAL INDEX

PAGE

| | |
|---|---|
| Statement of the case..... | 1 |
| 1. The specific provision for replacement of furniture, furnishings and personal property to the same condition as at the commencement of the term contained in paragraph seven of the lease controls the general language of paragraph thirteen relating to the real property..... | 2 |
| 2. The condemnation clause is not limited to particular condemnors, but includes the State of California; County of Santa Barbara or any other public body for highway or other public purpose..... | 3 |
| 3. We again assert Lebenbaum made only limited restoration of the premises..... | 4 |
| 4. We again assert Gawzners completed the restoration of all of the property and the repair and replacement of the furniture and equipment..... | 4 |
| Argument | 8 |

I.

The District Court erred in declaring that the condemnation clause of the lease did not apply to the within litigation because Lebenbaum concedes a condemnation clause may forfeit a tenant's right to an award and that the United States is a public body and the within action is for a public purpose 8

II.

That the District Court erred in the distribution of the award is conceded by Lebenbaum and the distribution of the award upon some ratio of reasonable rental value to Gawzners and prospective profits to Lebenbaum is also admitted by failure to answer the contentions advanced by Gawzners 11

III.

The court erred in admitting evidence of loss of profits..... 15

IV.

There is no evidence in the record that the court fixed the rental value of the unleased area by allowing some percentage less than the market value..... 16

V.

The court erred in refusing leave to file portions of Gawzners' proposed cross-complaint 16

Conclusion 17

Appendices :

Appendix I. AgreementApp. p. 1

Appendix II. Excerpt from Reporter's Transcript, page 16
.....App. p. 11

TABLE OF AUTHORITIES CITED

CASES

PAGE

| | |
|--|------------|
| Brooklyn etc. v. New York, 139 F. 2d 1007..... | 15 |
| Galvin v. Southern Hotel Corporation, 164 F. 2d 791..... | 13, 14, 16 |
| Gluck v. Baltimore, 81 Md. 315, 32 Atl. 515..... | 11, 12 |
| Hopkins v. McClure, 148 F. 2d 67..... | 13 |
| John Hancock Mutual Life Insurance Company v. United States, 155 F. 2d 977..... | 13 |
| Kimball Laundry v. United States, L. Ed. (Adv. Ops.) 1420.... | 15 |
| Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. Ed. 463 | 15 |
| Montana R. Co. v. Warren, 137 U. S. 348, 34 L. Ed. 681..... | 15 |
| Oliver v. United States, 156 F. 2d 281..... | 13 |
| Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526..... | 11, 12 |
| United States v. 21 Acres of Land, 61 Fed. Supp. 268..... | 10 |
| United States v. 53.25 Acres of Land, 47 Fed. Supp. 887..... | 13 |
| United States v. General Motors Corporation, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311..... | 13 |
| United States v. Miller, 317 U. S. 369, 87 L. Ed. 336..... | 15 |

TEXTBOOKS

| | |
|--|---|
| 12 American Jurisprudence, Sec. 243, p. 778..... | 2 |
| 12 American Jurisprudence, Sec. 244, p. 779..... | 2 |
| 56 American Jurisprudence, Sec. 1, p. 450..... | 2 |
| 56 American Jurisprudence, Sec. 2, p. 450..... | 2 |
| 67 Corpus Juris, Sec. 1, p. 610..... | 2 |

No. 12299.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

21 ACRES OF LAND, etc., *et al.*,

Defendants.

PAUL GAWZNER and IRENE GAWZNER,

Appellants and Cross-Appellees,

vs.

LEO LEBENBAUM,

Cross-Appellant and Appellee.

REPLY BRIEF FOR APPELLANTS PAUL GAWZNER AND IRENE GAWZNER.

Statement of the Case.

Gawznors are criticized for having omissions in their "Concise Abstract of Case" and for stating conclusions therein. It will be recalled that on page 15 of their Opening Brief Gawznors stated that they recognized the concise abstract did not include many of the side issues which arose. To have stated every position taken by the respective parties, including the United States, during the course of this litigation would have taken the space of the entire brief. We submit the Concise Abstract sets forth the essential facts and points involved. We shall, however, note the main criticisms.

1. The Specific Provision for Replacement of Furniture, Furnishings and Personal Property to the Same Condition as at the Commencement of the Term Contained in Paragraph Seven of the Lease Controls the General Language of Paragraph Thirteen Relating to the Real Property.

Gawzners are criticized for failing to note Paragraph Thirteen of the lease [R. 294]. It is fundamental that specific language in a document controls the general language.

12 *Am. Jur.* 778 and 779, Contracts, §§243, 244.

Paragraph Seven [R. 287] specifically refers to repair and replacement of furniture, furnishings and personal property. Paragraph Thirteen [R. 294] is titled "Waste," a term ordinarily applied to real property.

56 *Am. Jur.* 450, Waste, §§1 and 2;

67 *Corpus Juris* 610, Waste, §1.

A careful reading of the first paragraph of the Concise Statement (G.O.B. p. 3)* will disclose that the distinction was noted. It is submitted that the criticism has resulted either from a failure to read the Concise Statement with care or from a failure to examine the lease with care. Paragraph Thirteen does not *limit* Paragraph Seven. They cover different property. Seven covers *personal* property and is specific. Thirteen refers to *real* property and is general in its language. The District Court did not note this distinction [R. 178-179].

Reference is then made (L.A.B. 2) to the fact that the trial court found that the parties had in stipulating to the

*References to Gawzners' Opening Brief will be noted "G.O.B."; Lebenbaum's Answering Brief as "L.A.B." Reference to the Transcript of Record will be made by the letter "R." followed by the page referred to. All emphasis ours unless otherwise noted.

amount of restoration agreed to restoration in excess of that paid for by the United States or chargeable to it [R. 180; Finding 19, R. 229]. It is respectfully submitted that there is no word of testimony in the record or concession of the parties to support these findings by the learned trial judge. True, counsel for Lebenbaum in arguing that the Court should not allow Gawzners payment in full for the undisputed value of the unleased area contended that restoration had been made in full and, therefore, there was not enough money left to pay Gawzners in full for the unleased area and pay in full for the leased area. Contentions of counsel, however, are not evidence. Lebenbaum stipulated the exact amount for restoration and to the detailed amounts thereof [R. 356 to 362]. We refer this Honorable Court to the exact language of the stipulation. At the conclusion of the reading into the record of the detailed figures counsel for Lebenbaum stipulated the figures were correct and the stipulated items [R. 362]. We are at a loss to understand why Lebenbaum in his brief is now attempting to renounce his stipulation made at the trial.

2. The Condemnation Clause Is Not Limited to Particular Condemnors, but Includes the State of California; County of Santa Barbara or Any Other Public Body for Highway or Other Public Purpose.

In view of the concession made in the Answering Brief (L.A.B. 7) and the concession in Lebenbaum's Opening Brief on his own appeal (p. 32) that the United States is a *public body* and instant proceedings were for a *public purpose*, we submit that the Concise Abstract was not only *accurate* but *fair*. Immaterial language not involved in the cause was eliminated and the eliminations properly indicated.

3. We Again Assert Lebenbaum Made Only Limited Restoration of the Premises.
4. We Again Assert Gawzners Completed the Restoration of All of the Property and the Repair and Replacement of the Furniture and Equipment.

We shall treat criticisms 3 and 4 together. We realize that one of present counsel for Lebenbaum has but recently been associated and that may account for the unwarranted assertions in Lebenbaum's Answering Brief (p. 3) that the statements in the Concise Abstract are untrue.

The following statements are made in Lebenbaum's Answering Brief (L.A.B. 3):

"3. In the first complete paragraph on page 4 of their opening brief, Gawzners state that 'Lebenbaum made only limited restoration of the premises.' Such statement is not true and there is no supporting evidence in the record!"

"4. In the paragraph next following, Gawzners state 'and Gawzners completed the restoration of all of the property and the repair and replacement of furniture and equipment.' Such statement is not true and there is no supporting evidence in the record!"

It is most regrettable that this Honorable Court should be called upon to determine the truth of statements of fact made by counsel before this Court. However, we feel that a flat assertion that we have made a misstatement of fact cannot be ignored.

Lebenbaum never contended that he had expended more than approximately \$18,000 for restoration. (This does not appear in the printed portion of the record but does

appear in the Reporter's Transcript of April 25, 1947, pages 7 and 29.) Gawzners contended that many of the items claimed by Lebenbaum for restoration were actually maintenance charges after the hotel had been turned back to him [Reporter's Transcript April 25, 1947, pages 7 and 8 and May 12, 1947, pages 5 to 18]. Reference to this appears in the Court's Memorandum of Conclusions [R. 163-164].

In the Court's Memorandum of Conclusions [R. 105] reference is made to a statement appearing in a brief filed in the trial court January 2, 1947, by counsel for Gawzners in which it was claimed that though Lebenbaum had then been in possession of the hotel for six months after the United States' use had terminated, restoration had been made only in part [R. 146]. The Court did not note a contradiction of the statement.

Again in the Memorandum of Conclusions at a pre-trial hearing held January 17, 1947 [R. 148] counsel for Lebenbaum stated the estimate for restoration by his client was \$60,000 [R. 151]. Counsel for Gawzners stated the amount estimated by his client was over \$80,000 [R. 151].

At a further pre-trial hearing held February 28, 1947 [R. 151], counsel for Lebenbaum stated said defendant had expended \$17,000 for restoration since taking possession of the premises [R. 152]. Counsel for Gawzners stated there would be a dispute whether all this amount had been spent for restoration [R. 152].

On March 19, 1947, the second day of the trial between Gawzners and Lebenbaum it was stipulated the portion of the award "that should be allocated to restoration, repair and replacement of the property condemned, both real

and personal, is the sum of \$91,296" [R. 154 and 356]. Following this stipulation as to the amount of restoration there were many arguments and contentions made as to whether Lebenbaum should get this entire sum, whether Gawzners should get the entire sum, whether it should be impounded to be subject to joint control, whether it should be expended under the supervision of an interior decorator to be chosen by both parties or what should be done with the funds [R. 168, 169, and Reporter's Transcripts of April 25, 1947 and May 12, 1947].

On May 12, 1947, counsel for Lebenbaum agreed to turn the restoration fund over to Gawzners and *permit them to make restoration* provided Lebenbaum should be paid the sum of \$18,000 plus the sum of \$2,000 in the restoration fund established by the lease [R. 170]. On June 6, 1947, the parties presented a Stipulation dated June 5, 1947, to the Court [R. 170 and 435]. This Stipulation provided for the payment of the sum of \$91,296 allocated to restoration, \$10,500 to Lebenbaum and \$80,796 to Gawzners [R. 98-104]. That the restoration had not then been completed was recognized by comments of the trial court and by counsel for both Lebenbaum and Gawzners [R. 436].

Having stipulated that \$91,296 was the amount to be allocated for restoration, having never claimed to have spent more than approximately \$18,000 for restoration, much of which was disputed by Gawzners, and having accepted \$10,500 and waived any further claim to the resto-

ration fund [R. 101], we submit there is ample support in the record for the statement that Lebenbaum made only limited restoration of the premises.

The final refutation of the flat assertions of untruth imputed to Gawzners in their Opening Brief is found in an agreement executed by Lebenbaum and Gawzners in reference to such restoration contemporaneously with the Stipulation of June 5, 1947. This agreement was not filed and is not part of the record but we have printed it as an appendix to this brief (Appendix 1).

We regret the extent of this portion of the brief and crave this Honorable Court's indulgence. We refrain from going further outside this record and attempting to cover disputes which have occurred between the parties subsequent to the issues framed in this case and which may or may not be the subject of future litigation between the parties in some other court, even though Lebenbaum has referred to the same (L.A.B. 4). We attempted to have the trial court assume jurisdiction of one of these issues [Paragraphs IV, V and XX of Cross-Complaint of Gawzners, R. 78]. The trial court refused and struck these paragraphs [R. 353]. It was contended in Gawzners' Opening Brief that this was error (G.O.B. 48).

Incidentally, it will be noted that it was alleged in Paragraph XXI of the Cross-Complaint that Lebenbaum had failed to restore the premises [R. 79]. This paragraph was also stricken by the trial court [R. 353].

ARGUMENT.

I.

The District Court Erred in Declaring That the Condemnation Clause of the Lease Did Not Apply to the Within Litigation Because Lebenbaum Concedes a Condemnation Clause May Forfeit a Tenant's Right to an Award and That the United States Is a Public Body and the Within Action Is for a Public Purpose.

We again call the Court's attention to the concession made by Lebenbaum in reference to the condemnation clause. We shall re-quote that portion of the statement which includes the admissions.

"Summarizing, we do not dispute that a general condemnation clause may result in a forfeiture of a tenant's right to a condemnation award. We do not dispute that the term 'other public body' may be used to include the United States or that it is a 'public body.' We do not dispute that the instant case involves an eminent domain proceeding for 'a public purpose.' * * *" (L.A.B. 7).

We shall now set forth the pertinent parts of the condemnation clause of the lease, which we contend are controlling [R. 291].

"* * * In the event the State of California or the County of Santa Barbara or *any other public body* shall by condemnation acquire any additional portion of said leased premises for highway or *other public purpose*, the amount of the award in any such con-

demnation suit shall belong solely to the Lessors,
* * * Further in this connection, should the effect
of such condemnation be such as to reduce the rentable
rooms in said hotel by fifty (50) per cent, or to pre-
clude the subsequent use of the beach forming part
of the leased premises, then either party to this lease
may terminate the same on thirty (30) days' written
notice to the other." (Italics ours.)

We will now restate the condemnation clause by chang-
ing the italicized words in the quotation by inserting in lieu
thereof the appropriate words in accordance with the con-
cession made by Lebenbaum in his Answering Brief, just
above quoted, putting the changes also in italics.

"* * * In the event the State of California or
the County of Santa Barbara or *The United States
of America* shall by condemnation acquire any addi-
tional portion of said leased premises for highway or
Redistribution Station and Related Military Purposes
for a term of years commencing July 10, 1944, and
*ending June 1, 1946,** the amount of the award in any
such condemnation suit shall belong solely to the
Lessors, * * * Further in this connection, should
the effect of such condemnation be such as to reduce
the rentable rooms in said hotel by fifty (50) per
cent, or to preclude the subsequent use of the beach
forming part of the leased premises, then either party
to this lease may terminate the same on thirty (30)
days' written notice to the other." (Italics ours.)

*[Third Amended Complaint, Paragraphs VII, IX and XII, R.
39, 40 and 42.]

When the concession made by Lebenbaum is spelled into the condemnation clause as we have just done, the answer appears not only simple but obvious. Yet in spite of that simplicity, Lebenbaum still contends that the additional words in the condemnation clause requiring Lessors to pay any and all assessments levied in any such condemnation proceeding require this Court to say the condemnation clause does not apply to the within case. It is argued that the condemnation clause applies only to one in which *assessments were levied* (L.A.B. 6).

If this argument is carried to its logical conclusion, the condemnation clause would not even apply to a taking by the State of California for a highway unless an assessment were levied.

If the condemnation clause requires the payment of the award to Gawzners, it also requires a decision that the lease was cancelled by the giving of Notice of Cancellation by Gawzners to Lebenbaum [R. 305-309].

We submit that if the concession made by Lebenbaum in his Answering Brief had been made at the pre-trial hearing, the decision of the late Honorable Harry A. Hollzer would have been different. (*United States v. 21 Acres of Land*, 61 Fed. Supp. 268.)

II.

That the District Court Erred in the Distribution of the Award Is Conceded by Lebenbaum and the Distribution of the Award Upon Some Ratio of Reasonable Rental Value to Gawzners and Prospective Profits to Lebenbaum Is Also Admitted by Failure to Answer the Contentions Advanced by Gawzners.

Lebenbaum *specifically* admits that the District Court erred in the distribution of the award (L.A.B. 10). Lebenbaum may as well have specifically admitted the Court erred in admitting testimony of the prospective profits of Lebenbaum and using such testimony as a basis for apportioning a part of the award to Lebenbaum. No attempt is made to answer the many cases cited in Gawzners' Opening Brief that such procedure is error.

Lebenbaum again reasserts that the error of the Court consisted in failing to distribute the entire balance of the award to him. *Pasadena v. Porter*, 201 Cal. 381, 257 Pac. 526, and *Gluck v. Baltimore*, 81 Md. 315, 32 Atl. 515 are again cited. The fundamental difference of fact in those cases and the case at bar render them useless as authority.

In *Pasadena v. Porter*, *supra*, a portion of the leased premises was being acquired for a street. The court held the tenant must continue to pay the rent called for by the lease until the end of the term without reduction for the space lost and, therefore, should collect the equivalent of that rent from the condemning body.

By quoting language from those cases, applicable to the facts of those cases, Lebenbaum is here seeking to obtain the entire award. If he is not given the entire award, he claims the Court cannot award Gawznern more than \$1500 per month (See L.O.B. 20 and 55).

The facts in the case at bar are entirely different from the *Porter* and *Gluck* cases.

In the case at bar Lebenbaum was paying \$5,000 per month in the six months he ran the hotel [R. 434]. Throughout the brief Lebenbaum intimates he is still *obligated* to pay rent to Gawznern for the term the United States had the premises. Lebenbaum does not state how much rent, except as he intimates it should not exceed \$1500 per month. Lebenbaum insists jurisdiction to fix the amount to be paid Gawznern for such period must be fixed by a *State Court* and not the District Court. Does he hope by such a decision that he can convince a *State Court* that if he has collected in excess of \$100,000 in this litigation, he is obligated to pay but \$34,000 to Gawznern? Does he hope that by having the matter determined by a State Court he can, because of the long delay incident to this litigation, escape payment of any rental for the period the government had the premises?

There must be some motive for the insistence that no jurisdiction was vested in the trial court to distribute the award to anyone but Lebenbaum. All of the facts that would enter into a State Court trial were submitted before the District Court in the case at bar.

As we have heretofore shown, the jurisdiction to distribute the award in the case at bar is vested in the District Court.

Hopkins v. McClure (C. C. A. 10th), 148 F. 2d 67;

United States v. 53.25 Acres of Land, 47 Fed. Supp. 887;

Oliver v. United States (C. C. A. 8th), 156 F. 2d 281;

Galvin v. Southern Hotel Corporation, 164 F. 2d 791.

The case of *John Hancock Mutual Life Insurance Company v. United States*, 155 F. 2d 977, is authority for the fact that the tenant cannot collect from the Government rent which he was not obligated to pay to the landlord when the lease had on bonus value. In the *John Hancock Mutual Life Insurance Company* case it was indicated that the government had paid the landlord direct for the rental of the premises.

In the case of *United States v. General Motors Corporation*, 323 U. S. 373, 65 S. Ct. 357, 89 L. Ed. 311, it is clear from the concurring opinion that the tenant was continuing to pay the landlord the rent reserved in the lease.

On page 14 of Lebenbaum's Answering Brief it is again asserted that Lebenbaum did pay rent until Gawzner refused to accept further rent. *Lebenbaum has not yet paid any rent for the period the United States had possession of the property* [Finding 13, R. 226, Stipulation by counsel for Lebenbaum, R. 422]. There is no statement in the record that Lebenbaum ever tendered any

rent for the period the United States was in possession except to move the District Court to award to him the amount of the minimum rental from the funds in the Registry and that motion was made nearly a year and a half after the Government took possession [R. 7]. The only rent Lebenbaum ever tendered was for *the period subsequent to June 1, 1946, after possession of the premises had been returned to him by the United States pursuant to order of Court* and he had again started operating the hotel as such. We suggest the Court examine the portions of the record referred to by Lebenbaum to verify these statements [R. 226; F. 12, 13; 202; 83; 117; 348-349; 8 par. 1; 11-12].

Lebenbaum then refers to *Galvin v. Southern Hotel Corporation*, 164 F. 2d 791, upon which Gawzners rely, and particularly to the portion of that decision relating only to the cancellation of the lease for failure of the tenant to abide by the conditions of the lease subsequent to the property being returned by the government. However, Gawzners cited the *Galvin* case primarily as authority that the District Court had jurisdiction to apportion the award in the case at bar, *the apportionment to be made upon the basis of reasonable rental value to the landlord and bonus value to the tenant*.

Lebenbaum's contentions, that if Gawzners were awarded the reasonable rental value of the premises during the period the United States was in possession *in this action*, that Gawzners could again collect from Lebenbaum in a State Court, are unwarranted. If Gawzners collected the reasonable rental value of the premises in this case, they certainly would be unable to collect a second time in a State Court.

III.

The Court Erred in Admitting Evidence of Loss of Profits.

We submit that the cases cited by Gawzners in their Opening Brief (pp. 40 to 44, incl.) establish conclusively the rule of law that a defendant in a condemnation action cannot recover for loss of profits. It is respectfully submitted that the cases cited by Lebenbaum* (L.A.B. 19), do not authorize the recovery of profits. It will be remembered in the case at bar that evidence of past profits [L. Ex. A, R. 312] and prospective profits [L. Ex. B, R. 324] was the only evidence offered by Lebenbaum.

On page 20 in the second full paragraph of Lebenbaum's Answering Brief the statement is made "that the stipulated judgment against the Government *did not* include compensation for ordinary wear and tear [R. 55]." Lebenbaum's counsel contended in the District Court that the judgment against the government *did* include compensation for ordinary wear and tear [Reporter's Transcript April 25, 1947, page 16—see Appendix II].

**U. S. v. Miller*, 317 U. S. 369, 374-375, 87 L. Ed. 336, 342, 343; *Kimball Laundry v. U. S.*, L. Ed. Adv. Opin. 1420. Cf. *Brooklyn etc. v. N. Y.*, 139 F. 2d 1007, 1013; *Monongahela Nav. Co. v. U. S.*, 148 U. S. 312, 37 L. Ed. 463, 468; *Montana R. Co. v. Warren*, 137 U. S. 348, 352, 34 L. Ed. 681.

IV.

There Is No Evidence in the Record That the Court Fixed the Rental Value of the Unleased Area by Allowing Some Percentage Less Than the Market Value.

It is respectfully submitted that there is no evidence in the record to ascertain how the Court arrived at its judgment. Lebenbaum's counsel advised the trial court that he was unable to ascertain any factual basis for the judgment [R. 188]. In Lebenbaum's Opening Brief to this Court, at page 11, calculations were made of what *apparently* the Court did but there is absolutely no evidence in the record to indicate that is *what* the Court did. In fact to make the calculations tie in with the testimony at all it was necessary for counsel to assume that the Court transposed the percentages (L.O.B. 12). By the time Lebenbaum's Answering Brief was filed counsel were convinced that the Court *did* what they first stated *could not be ascertained from the record* and later *assumed* might have been done.

V.

The Court Erred in Refusing Leave to File Portions of Gawzners' Proposed Cross-Complaint.

We again submit that the case of *Galvin v. Southern Hotel Corporation*, 164 F. 2d 791, is authority for the fact that the Court should have permitted Gawzners to file Paragraph IV, V, XX and XXI of the Cross-Complaint and Exhibit B attached thereto.

We are frank to say we do not see how Lebenbaum interprets the agreement of July 23, 1946, which was an agreement covering possession of the premises subsequent

to June 1, 1946, as a waiver of the jurisdiction of the trial court over issues occurring after the period of taking had expired. Incidentally, this agreement referred to by Lebenbaum is Exhibit B [R. 82] attached to the Cross-Complaint, which exhibit the Court refused to consider [R. 353].

Conclusion.

We again respectfully request that this Honorable Court should remand the cause to the District Court with instructions to enter judgment for Paul Gawzner and Irene Gawzner, cancelling the lease and directing that the balance of the funds in the Registry of the Court should be distributed to them:

- a. Because the lease between the parties had been cancelled by the institution of the within eminent domain proceedings and the giving of the Notice of Cancellation by Gawznors to Lebenbaum;
- b. Because the condemnation clause of the lease requires the payment of all awards in an eminent domain action to Gawznors; and
- c. Because there was no bonus value in Lebenbaum's lease and, therefore, the remaining portion of the funds on deposit in the Registry of the Court is the stipulated compensation for the use of said premises by the United States for the term taken.

Respectfully submitted,

HILL, MORGAN & FARRER, and
STANLEY S. BURRILL,

By STANLEY S. BURRILL,

*Attorneys for Appellants Paul Gawzner and
Irene Gawzner.*

APPENDIX I.

Agreement.

Whereas, Paul Gawzner and Irene Gawzner are the owners of those certain premises in the County of Santa Barbara, State of California, commonly known and referred to as Miramar Hotel and Bungalows; and

Whereas, the said Paul Gawzner and Irene Gawzner, as lessors, and Leo Lebenbaum, as lessee, made and entered into a lease dated December 15, 1943, of said Miramar Hotel and Bungalows, which said lease is hereby referred to for the particulars thereof; and

Whereas, on or about July 10, 1944, the United States of America filed an action in condemnation in the District Court of the United States in and for the Southern District of California, Central Division, entitled "United States of America, plaintiff, vs. 21 Acres of Land, more or less, in the County of Santa Barbara, etc., Paul Gawzner, *et al.*, defendants," being numbered therein 3752-W Civil, seeking to acquire the use and possession of said Miramar Hotel and Bungalows for a term of years, reference to which said action is hereby made for the particulars thereof; and

Whereas, the said United States of America and the said Paul Gawzner, Irene Gawzner and Leo Lebenbaum did on or about November 26, 1946, enter into a stipulation for the entry of an interlocutory judgment in said proceedings; and

Whereas, an Interlocutory Judgment in Condemnation was made and entered in said proceedings on or about November 26, 1946, reference to which said Judgment is made for the particulars thereof; and

Whereas, said Interlocutory Judgment fixed the just compensation to be paid by said United States of America for the taking of the term of years sought in said proceeding, together with all compensation to be paid as damages arising out of any failure or default upon the part of said United' States of America in performance of its obligation to restore such premises, at the sum of \$205,000 and the said United States of America has deposited in the Registry of said Court the sum of \$205,000 less the sum of \$1,672.23, which latter sum was deemed to have been received by said Leo Lebenbaum upon account of any compensation found to be due him; and

Whereas, by said Interlocutory Judgment the Court retained jurisdiction to determine the amount of the interests of all parties who had appeared in said proceeding, or who might thereafter appear therein, if any, in and to said just compensation the same as though a jury had rendered a verdict in the amount of \$205,000; and

Whereas, in the course or proceedings had between the said Paul Gawzner and Irene Gawzner, on the one hand, and Leo Lebenbaum, on the other hand, in said above referred to action in reference to their respective claims in and to said award, it was stipulated in open Court as follows:

“It is stipulated that the portion of the award made by the Judgment of November 26, 1946, in the within cause that should be allocated to restoration, repair and replacement of the property condemned, both real and personal, is the sum of \$91,296.00.”;

and

Whereas, the said Paul Gawzner and Irene Gawzner, on the one hand, and the said Leo Lebenbaum, on the other hand, have contended that they each have the right to the control and management of said restoration fund and there have been other divers disputes and contentions made by each of them in reference to said restoration fund; and

Whereas, it is the desire of said Paul Gawzner and Irene Gawzner, on the one hand, and the said Leo Lebenbaum, on the other hand, to settle their disputes in reference to said restoration fund:

Now, Therefore, in consideration of the premises and the mutual covenants herein contained, it is hereby agreed by and between the parties hereto as follows:

1. That the said Leo Lebenbaum has expended towards the restoration of said premises at least the sum of \$10,500 and that said sum should be paid to him out of the funds on deposit in the Registry of said Court and that said sum of \$10,500.00 should be charged against the said sum of \$91,296.00.

2. That there should be paid to the said Leo Lebenbaum the sum of \$1,116.19, being the amount on deposit with the County National Bank and Trust Company, Santa Barbara, California, which account was created pursuant to the provisions of Paragraph Seven of said lease dated December 15, 1943.

3. That the said Leo Lebenbaum shall be relieved of the requirement of depositing three per cent (3%) of the gross business from the rental of cottages, rooms, cabanas, lockers and beach privileges and from the sale

of beer, wine and liquor, including soft drinks, as provided in Paragraph Seven of said lease dated December 15, 1943, from the date of July 10, 1944, to January 1, 1949.

4. That said Paul Gawzner and Irene Gawzner shall dismiss with prejudice that certain action entitled "Paul Gawzner and Irene Gawzner, plaintiffs, vs. Leo Lebenbaum, defendant," pending in the Superior Court of the State of California in and for the County of Santa Barbara and numbered 39,224, and shall cause to be released the Writ of Attachment issued in connection with said proceedings and in this connection the said Leo Lebenbaum hereby waives any claim of whatsoever nature, if any, arising out of the institution of said action No. 39,224 and the issuance of the Writ of Attachment in said action and consents that the bond filed in connection with said attachment may be exonerated.

5. That the said Leo Lebenbaum upon the payment to him of the amounts, provided in Paragraphs 1 and 2 hereof and in consideration of the waiver set forth in Paragraph 3 hereof, hereby waives any further claim to be paid any additional sum of money for any alleged restoration of said premises, whether to be repaid from said sum of \$91,296.00, or otherwise, and further agrees that the provisions of Paragraphs 1, 2, 3 and 4 of this agreement constitute full compensation to him for any restoration or replacement which he may have done to the said premises known as the Miramar Hotel and Bungalows subsequent to June 1, 1946, the date upon which the said United States of America surrendered possession of said premises, and said Leo Lebenbaum further agrees that upon the payment to him of said sum of \$10,500 out of the Registry of said United States District Court

that said payment shall constitute full compensation to him for any portion of the award made by the Judgment of November 26, 1946, that was allocated to the restoration, repair and replacement of the property condemned and he will waive any further claim to that portion of said award allocated to restoration of said premises.

6. That the balance of said sum of \$91,296 that was allocated to the restoration, repair and replacement of the property condemned, both real and personal, after the payment to said Leo Lebenbaum of \$10,500, to wit, the sum of \$80,796 shall be paid to Paul Gawzner and Irene Gawzner out of the Registry of said United States District Court and that upon the payment of said sum of \$80,796 to said Paul Gawzner and Irene Gawzner they hereby agree that said sum shall constitute full compensation to them for any portion of the award made by the Judgment of November 26, 1946, that was allocated to the restoration, repair and replacement of the property condemned, both real and personal, and they will waive any further claim to that portion of said award allocated to restoration of said premises.

7. That upon receipt of said sum of \$80,796 said Paul Gawzner and Irene Gawzner shall deposit the same in a separate bank account, which shall be known as a rehabilitation or restoration account and shall expend said sum of money to accomplish the complete restoration, repair and replacement of said Miramar Hotel and Bungalows to the end that said Miramar Hotel and Bungalows shall be restored and repaired and furniture and furnishings replaced into at least as good condition as said premises were in on July 10, 1944.

That if after the completion of said restoration and replacement any balance of said sum of \$80,796 is unexpended that the same shall be deposited in the bank account provided for by Paragraph Seven of said lease dated December 15, 1943, to be dealt with as provided by said Paragraph Seven.

8. That the said Paul Gawzner and Irene Gawzner shall be diligent in their efforts towards the restoration of said Miramar Hotel and Bungalows and the furniture and furnishings thereof, but shall have a period not to exceed ten (10) months from the date of the receipt of said sum of \$80,796 within which to complete such restoration and said Leo Lebenbaum shall make available to said Paul Gawzner and Irene Gawzner at all times at lease two units or cottages during the period of restoration in order to permit said Paul Gawzner and Irene Gawzner to accomplish said restoration and shall also make available without charge the use of the building (constructed by the Army as a recreation room) during said period of restoration as a storage and workshop in connection with such restoration.

9. That the said Paul Gawzner and Irene Gawzner shall have absolute discretion in the expenditure of said sum of \$80,796 so long as the same is used to restore and repair said Miramar Hotel and Bungalows and replace the furniture and furnishings thereof but they shall employ in a consulting capacity Verna Dunlevy, or some other interior decorator, and the fees and expenses of such interior decorator will be a proper charge against said rehabilitation or restoration account, except that the fees of such interior decorator shall not exceed \$2,500 without the approval of all parties to this agreement.

If said sum of \$80,796 is expended before said Miramar Hotel and Bungalows have been restored and repaired and the furniture and furnishings therein replaced to at least as good condition as they were in on July 10, 1944, the said Paul Gawzner and Irene Gawzner shall from their own funds complete the restoration and repair of said Miramar Hotel and Bungalows and the replacement of the furniture and furnishings thereof to at least as good condition as said premises were in on July 10, 1944.

10. That each month after said restoration is started said Paul Gawzner and Irene Gawzner shall render an account to Leo Lebenbaum of the funds expended during the previous month from said rehabilitation or restoration account and said Leo Lebenbaum shall be entitled, if he so desires, to audit the invoices and expenditures made from said funds to the end that said sum of \$80,796 shall be expended only toward the repair and restoration of said premises or the replacement of furniture and furnishings therein.

11. That it shall be considered that the amounts paid or due to the Walter M. Ballard Corporation for their survey and other charges in connection with the restoration of said Miramar Hotel and Bungalows is a proper charge against said sum of \$80,796, if the said Paul Gawzner and Irene Gawzner desire to charge the same thereto.

However, there shall be no charge to said rehabilitation or restoration account for any personal services rendered or personal expenditures made by said Paul Gawzner, Irene Gawzner or any members of their family.

Any furniture, furnishings purchased or other expenditures made by said Paul Gawzner and Irene Gawzner

shall be charged to said rehabilitation or restoration account at the cost thereof to said Paul Gawzner and Irene Gawzner.

12. The parties hereto shall cooperate in all reasonable ways to the end that said repairs, restoration and replacements shall be promptly and efficiently done with as little interference as possible to the operation of said hotel and said Paul Gawzner and Irene Gawzner shall not, so long as Leo Lebenbaum is entitled to the possession thereof, interfere with the management of said Miramar Hotel and Bungalows, except in so far as necessary in the restoration and repair of said premises and the replacement of the furniture and furnishings thereof.

13. Except as in this agreement provided to the contrary, this agreement is made without prejudice to the rights of any of the parties hereto to assert and maintain in any litigation any and all claims which they have heretofore advanced or may hereafter advance in said litigation and the payment of said funds or the acceptance thereof under the terms and conditions of this agreement shall not operate to estop the parties or either or them to assert any rights for which they have heretofore or may hereafter contend, nor shall the payment of said funds or the acceptance thereof be construed to be a relinquishment of any of the rights asserted by any of the parties to this agreement, save and except that his agreement shall be conclusive between the parties as to their rights to that portion of the award made in said action No. 3752-W Civil allocated pursuant to stipulation of the parties hereto to the restoration, repair and replacement of the property condemned in said action, both real and personal, which said portion of the award was by stipulation agreed to be the sum of \$91,296.00.

Upon the said United States District Court ordering the payment from the Registry of said Court of said sum of \$91,296.00 to the parties hereto, as provided by this agreement, the parties hereto waive any further contentions as to that portion of the award made by said Judgment of November 26, 1946, and agree that the same shall be controlled by the terms of this agreement.

14. There has heretofore been prepared a list of expenditures made by Lebenbaum in the restoration of the Miramar Hotel and Bungalows as per a computation made as of March 23, 1947. Said computation sets forth items rejected by Paul and Irene Gawzner and as to all such rejected items, Lebenbaum shall have the right and privilege of removing said items when the same have been replaced by Paul and Irene Gawzner in accordance with the provisions of this agreement.

15. Lebenbaum is hereby relieved of any obligations or liabilities for shortages in the inventory due to the occupation of the Miramar Hotel and Bungalows by the United States Government. Upon the completion of the rehabilitation as contemplated by this agreement, a new inventory of all furniture and equipment shall be made, and upon the acceptance of said inventory, the original inventory accepted by Lebenbaum at the time of the execution of the original lease shall be deemed and considered as superseded by the new inventory, and from and after said date, Lebenbaum shall be released of all obligations and liabilities for the original inventory, and shall thereafter be liable only for the items as set forth on the new inventory.

16. In carrying out the provisions of the rehabilitation as provided in this agreement, Paul and Irene Gawz-

ner shall not incur any liability in the name of Miramar Hotel and Bungalows, or any liability for which Lebenbaum could be held liable.

17. In the completion of the rehabilitation as provided in this agreement, all labor and material shall be of a quality and quantity at least equal or equivalent to that specified in the Ballard report.

18. Paul and Irene Gawzner hereby do assume and agree to pay all known obligations to Walter M. Ballard Corporation heretofore incurred by any of the parties hereto.

19. As a part of the rehabilitation, Paul and Irene Gawzner agree that they will remove the "recreation" building erected by the United States Government to a new location on the grounds of the Miramar Hotel, and when so removed, shall partition the same for use by the employees of the said hotel as living quarters.

20. Reference is hereby made to paragraph 8 above, and it is mutually understood and agreed that the two units or cottages to be made available to Paul and Irene Gawzner shall at all times be selected and designated by Lebenbaum.

In Witness Whereof, the parties hereto have hereunto set their hands this 5th day of June, 1947.

/s/ LEO LEBENBAUM
Leo Lebenbaum

/s/ PAUL GAWZNER
Paul Gawzner

/s/ IRENE GAWZNER
Irene Gawzner.

APPENDIX II.

[Rep. Tr. p. 16, April 25, 1947.]

“Mr. Hearn: If your Honor please, I understand that to mean this, that the government had an obligation to restore such damage as it might do to the property over and above ordinary wear and tear and that that obligation to so restore is deemed compensated by this judgment. However, that does not mean that the item of ordinary wear and tear entered into the judgment at no place whatsoever. It really entered into the balance of the judgment over and above that item of damages, that is to say, had we litigated the subject of how much damage the government did to the premises, then ordinary wear and tear would have been included over that particular question, but, by the same token, as Mr. Burrill has said, it would have been included in the amount that was set up for rent. So that I understand the award that is now in the registry of the court includes a sum appropriate to ordinary wear and tear, probably under the heading of ‘Rent.’ Do you so understand it, Mr. Burrill?”

No. 12302

United States
Court of Appeals
For the Ninth Circuit.

CAPITAL SERVICE, INC., a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court
of the United States

FILED

DEC 9 1948

PAUL P. O'BRIEN,

CLERK

No. 12302

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

| | PAGE |
|--|------|
| Amended Designation of Record for Printing on Appeal..... | 425 |
| Amended Petition..... | 21 |
| Answer | 16 |
| Answer to Amended Petition..... | 26 |
| Appeal: | |
| Amended Designation of Record for Print- ing on..... | 425 |
| Statement of Points on..... | 422 |
| Supplement to Amended Designation of Record for Printing on..... | 428 |
| Appearances | 1 |
| Certificate of Clerk (D.C.)..... | 420 |
| Decision | 411 |
| Designation of Record, Proceedings and Evi- dence to Be Contained in Record of Review Pursuant to Rule 75 of Federal Rules of Civil Procedure | 418 |

| | INDEX | PAGE |
|--|-------|------|
| Docket Entries..... | | 2 |
| Entry of Appearance..... | | 78 |
| Exhibits, Petitioner's: | | |
| No. 9—Letter Dated June 1, 1937, to Gas Fuel Service Co..... | | 116 |
| 10—Letter Dated June 2, 1937, to Shell Oil Co..... | | 119 |
| 11—Letter Dated July 7, 1937, to Rail- road Commission..... | | 123 |
| 12—Letter Dated July 21, 1937, to Railroad Commission..... | | 127 |
| 13—Letter Dated Nov. 1, 1937, to Gas Fuel Service Co..... | | 130 |
| 14—Letter to Kettleman-Lakeview Oil and Gas Co. From Mrs. C. H. Meyers | | 134 |
| 15—Letter Dated Sept. 12, 1938, to Mrs. C. H. Meyers..... | | 135 |
| 16—Letter Dated October 8, 1938, to Railroad Commission..... | | 137 |
| 17—Letter Dated Feb. 24, 1939, to Cen- tral Calif. Utilities Corp..... | | 140 |
| 18—Letter Dated March 1, 1939, to Railroad Commission..... | | 142 |
| 19—Letter Dated March 16, 1939, to Mr. R. H. Anderson..... | | 146 |

Exhibits, Petitioner's—(Continued) :

| | |
|---|-----|
| 20—Letter Dated August 14, 1939, to Central Calif. Utilities Corp..... | 149 |
| 21—Letter Dated August 16, 1939, to Railroad Commission..... | 151 |
| 22—Letter Dated December 13, 1939, to Central Calif. Utilities Corp..... | 153 |
| 23—Letter Dated Dec. 26, 1939, to Rail- road Commission..... | 155 |
| 24—Letter Dated June 18, 1940, to Cen- tral Calif. Utilities Corp..... | 156 |
| 25—Letter Dated June 27, 1940, to Railroad Commission..... | 158 |
| 26—Letter Dated March 17, 1941, to Central Calif. Utilities Corp..... | 160 |
| 27—Letter Dated March 25, 1941, to Railroad Commission..... | 163 |
| 28—Letter Dated March 25, 1941, to Mr. Raphael Dechter..... | 165 |
| 29—Letter Dated August 21, 1941, to Mr. Ben B. Dudley..... | 172 |
| 30—Letter Dated Oct. 11, 1937, to Cen- tral Calif. Utilities Corp..... | 241 |
| 31—Letter Dated Nov. 1, 1937, to Cen- tral Calif. Utilities Corp..... | 243 |

INDEX

PAGE

Exhibits, Petitioner's—(Continued) :

| | |
|---|-----|
| 32—Letter Dated Oct. 15, 1941, to Central Calif. Utilities Corp..... | 244 |
| 33—Letter Dated Dec. 2, 1941, to Central Calif. Utilities Corp..... | 245 |
| 34—Letter Dated Feb. 3, 1942, to Central Calif. Utilities Corp..... | 246 |
| 35—Letter Dated March 16, 1942, to Central Calif. Utilities Corp..... | 247 |
| 36—Letter Dated May 22, 1942, to Central Calif. Utilities Corp..... | 248 |
| 37—Letter Dated June 9, 1942, to Railroad Commission..... | 249 |

Exhibits, Respondent's :

| | |
|---|-----|
| I—Letter Dated Nov. 22, 1940, From the Revenue Agent..... | 208 |
| J—Letter Dated Dec. 2, 1940, From R. W. Moore | 210 |
| K—Letter Dated July 1, 1940, to Capital Service, Inc..... | 293 |
| L—Letter Dated Feb. 4, 1941, to Capital Service, Inc..... | 310 |
| M—Certificate of the State of California.. | 372 |

| | |
|---|----------|
| Memorandum of Findings of Facts and Opinion | 391, 392 |
|---|----------|

| INDEX | PAGE |
|---|---------|
| Motion to Correct Transcript..... | 390 |
| Motion for Extension of Time for Filing Opening and Reply Briefs..... | 387 |
| Motion for Leave to File Amended Petition... | 20 |
| Motion to Substitute Counsel..... | 77, 417 |
| Notice of Petition for Review..... | 415 |
| Notice of Place of Hearing..... | 18 |
| Notice of Setting Proceeding for Hearing— Circuit Calendar..... | 19 |
| Petition | 4 |
| Petition for Review of a Decision of the Tax Court of the U. S. by the U. S. Court of Appeals | 412 |
| Proceedings | 80 |
| Request for Designation of Place of Hearing.. | 18 |
| Statement of Points on Appeal..... | 422 |
| Stipulation of Facts..... | 27 |

Joint Exhibits:

| | |
|---|----|
| No. 1-A—Opinions and Orders of the Railroad Commission Dated July 21, 1933..... | 32 |
| 2-B—Decision of the Railroad Commission Dated Aug. 28, 1933 | 49 |

INDEX

PAGE

Joint Exhibits—(Continued):

3-C—Ordinance No. 151 of Kings County, Calif. 52

4-D—Ordinance No. 290 of Fresno County, Calif. 56

5-E—Application No. 21581 Filed Nov. 10, 1937, by Gas Fuel Service Co. 63

6-F—Decision of the Calif. Railroad Commission Dated Jan. 3, 1938. 66

7-G—Decision of the Calif. Railroad Comm. of Calif. Dated Oct. 6, 1942. 71

8-H—Photo of General Ledger . . . 73

Supplement to Amended Designation of Record for Printing on Appeal. 428

Witnesses, Petitioner's:

Bauer, Roy M.

—direct 336

—cross 354

—redirect 363

—recross 368

Brashears, G.

—direct 317

—cross 331

INDEX

PAGE

Witnesses, Petitioner's—(Continued) :

| | |
|------------------------|-----|
| Moore, Harry W. | |
| —direct | 281 |
| —cross | 288 |
| —redirect | 313 |
| —recross | 315 |
| Moore, Ralph W. | |
| —direct | 84 |
| —cross | 180 |
| —redirect | 215 |
| —recross | 226 |
| Woodard, George C. | |
| —direct | 229 |
| —cross | 256 |
| —redirect | 272 |

APPEARANCES

For Petitioner:

HYMAN SMITH, ESQ.,*

CHARLES M. WALKER, ESQ.,*

JAMES L. WOOD, ESQ.,*

HYMAN SMITH, ESQ.

*Withdrawn.

For Respondent:

R. E. MAIDEN, ESQ.

Docket No. 13562

CAPITAL SERVICE, INC., a corporation,
 Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
 Respondent.

DOCKET ENTRIES

1947

Apr. 17—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 18—Copy of petition served on General Counsel.

May 28—Answer filed by General Counsel.

May 28—Request for hearing in Los Angeles filed by General Counsel.

June 3—Notice issued placing proceeding on Los Angeles calendar. Service of answer and request made.

1948

Feb. 13—Hearing set April 26, 1948 at Los Angeles, California.

May 5,—Hearing had before Judge Arnold on 6, 11, merits. Petitioner's motion to file amended petition—no objection by respondent—granted. Respondent's motion to file amended answer thereto—granted. Permission given to conform duplicate stipulation. Leave granted to counsel for respondent to withdraw exhibits and substitute photostats. By agreement of coun-

1948

sel the income tax returns of Gas Fuel Service Co. from 1936 to 1940 be supplied and marked Exhibits EE to II inclusive. Stipulation of facts, amended petition and amended answer filed at hearing. Appearance of Charles M. Walker and James L. Wood as counsel filed. Briefs due 6/21/48—replies 7/21/48.

May 28—Transcript of hearing of May 5, 1948 filed.

May 28—Transcript of hearing of May 6, 1948 filed.

May 28—Transcript of hearing of May 11, 1948 filed.

June 14—Motion for extension to July 31, 1948 to file opening briefs and August 30, 1948 to file reply briefs filed by General Counsel. 6/15/48 granted.

June 30—Brief filed by taxpayer. 8/2/48 copy served.

June 30—Brief filed by General Counsel.

Aug. 2—Motion to correct transcript of record filed by taxpayer. Granted.

Aug. 24—Reply brief filed by taxpayer. 8/25/48 copy served.

1949

May 10—Memorandum findings of fact and opinion rendered, Arnold, J., Decision will be entered for respondent. 5/10/49 copy served.

May 12—Decision entered, Arnold, J., Div. 12.

June 15—Motion to withdraw Joseph D. Brady, Walter L. Nossaman and Charles M. Walker as counsel and appearance of Hy-

1949

man Smith as counsel for taxpayer filed—
granted.

June 15—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by taxpayer.

June 15—Designation of record filed by taxpayer with affidavit of service thereon.

June 20—Affidavit of service of petition for review filed.

June 29—Motion to withdraw James L. Wood as counsel and to substitute Hyman Smith in his place filed by taxpayer—granted.

The Tax Court of the United States
Docket No. 13562

CAPITAL SERVICE, INC., a corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency LA:IT:90D:PAK, dated January 30, 1947, and as a basis of this proceeding alleges as follows:

1. Petitioner is a California corporation, incorporated under the laws of the State of California under date of April 23, 1936, with its principal office at 510 South Spring Street, Los Angeles 13,

California. Consolidated returns for Capital Service, Inc., and A. & W. Baking Company (name changed to Danish Maid Bakery) for the period herein involved were filed with the Collector of Internal Revenue for the Sixth District of California.

2. The Notice of Deficiency, a copy of which is attached and marked "Exhibit A," was mailed to petitioner on January 30, 1947.

3. The tax in controversy is Income Tax for the year 1943, as follows:

| | |
|------------------|------------|
| Liability | \$7,358.10 |
| Assessed | None |
| Deficiency | \$7,358.10 |

4. The determination of tax set forth in said notice of deficiency is based upon the following error:

The disallowing of a net operating loss carry-over from the taxable year ended December 31, 1942, in an amount of \$27,492.98.

The Tax Court has jurisdiction in the above matter under Section 272 of the Internal Revenue Code.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

The consolidated return as filed for the taxable year ended December 31, 1943, resulted in a net loss of \$23,012.20. One of the deductions included in said return was the net operating loss carry-over of Capital Service, Inc., of \$27,492.98, which was the amount of the loss as disclosed by the return

filed for the taxable year ended December 31, 1942. The loss as shown by the return of Capital Service, Inc., for its fiscal year ended December 31, 1942, was adjusted by the Examining Agent disallowing as a deduction a bad debt and stock loss occurring during the year 1942, in the amount of \$32,867.81. The adjustment disallowing the loss in the year 1942 resulted further in the elimination of the net operating loss carry-over to the year 1943. The amount of \$32,867.81 disallowed by the Examining Agent for the taxable year ended December 31, 1942, was made up as follows:

| | |
|---|-------------|
| Investment in 1,050 shares of capital stock of the Central California Utilities Corporation | \$ 1,300.00 |
| Net amount due for moneys advanced to Central California Utilities Corporation and carried upon the books and records of Capital Service, Inc. as an account receivable | 31,567.81 |
| | <hr/> |
| Total | \$32,867.81 |

The principal asset of the Central California Utilities Corporation was the ownership of all of the capital stock of the Gas Fuel Service Company, which company had a franchise for the transmission and distribution of gas in specified portions of Fresno and Kings Counties, State of California, this franchise being an exclusive franchise granted by the Railroad Commission of the State of Cali-

ifornia. The aforementioned franchise from the State Railroad Commission was cancelled by the Railroad Commission of the State of California on October 6, 1942 (Railroad Commission Order No. 35825). Upon the loss of the franchise the investment of Central California Utilities Corporation in the Gas Fuel Service Company became worthless; likewise, the investment of and advances by Capital Service, Inc. to and in Central California Utilities Corporation became worthless.

Petitioner expects to prove that at all times the principal asset of the Central California Utilities Corporation was the ownership of the stock of the Gas Fuel Service Company; that the value of the stock of the Gas Fuel Service Company was the value that could be attributed to the exclusive franchise from the State Railroad Commission for the transmission and distribution of gas in the portions of Fresno and Kings Counties; that up to the time immediately preceding the loss of the franchise the company had various plans for the utilization of the franchise, either through the merger with other interests or through its sale to others; that at no time prior to the cancellation of the franchise by the Railroad Commission had the loss been ascertained, and petitioner expects to prove that the loss was occasioned solely and by virtue of the cancellation of the exclusive franchise owned by the Gas Fuel Service Company.

Wherefore, petitioner prays that this Court may hear the proceedings and approve the net operating

loss carry-over from the taxable year ended December 31, 1942, in arriving at the net taxable income for the taxable year ended December 31, 1943.

April 16, 1947, Los Angeles, California.

CAPITAL SERVICE, INC.

[Corporate Seal]

By /s/ F. E. DENT,
Secretary,
Petitioner.

/s/ HYMAN SMITH,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss.

F. E. Dent, being duly sworn, says: That he is Secretary of Capital Service, Inc., the petitioner above named; that he is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true except those stated to be upon information and belief, and that those he believes to be true.

/s/ F. E. DENT.

Subscribed and sworn to before me this 16th day of April, 1947.

[Seal] /s/ MYRTLE M. MATTHEWS,

Notary Public in and for the County of Los Angeles, State of California.

EXHIBIT A

Form 1279

SN-IT-7

Office of Internal Revenue Agent in Charge
Los Angeles Division
LA:IT:90D:PAK

Treasury Department
Internal Revenue Service
417 South Hill Street
Los Angeles 13, California

January 30, 1947

Capital Service, Inc.
510 South Spring Street
Los Angeles 13, California

Gentlemen:

You are advised that the determination of your income tax liability and that of your affiliated company for the taxable year ended December 31, 1943 discloses a deficiency of \$7,358.10, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed forms and forward it to the Internal Revenue Agent in Charge, Los Angeles, California for the attention of LA: Conf. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOSEPH D. NUNAN, JR.,
Commissioner.

By /s/ GEORGE D. MARTIN,
Internal Revenue Agent
in Charge.

PAK:bl

Enclosures:

Statement

Form of waiver

Statement

LA:IT:90D:PAK

Capital Service, Inc.
 510 South Spring Street
 Los Angeles 13, California

Returns Examined

| | Form | Year |
|--------------------------------------|------|------|
| Capital Service, Inc. | | |
| Los Angeles, California..... | 1120 | 1943 |
| Subsidiary Company: | | |
| A and W Baking Company..... | 1122 | 1943 |
| (Name changed to Danish Maid Bakery) | | |
| Los Angeles, California | | |

Income Tax Liability of Capital Service, Inc., and Each Subsidiary Company Above Named, as Provided in Section 23.15 of Regulations 104, Prescribed Under Section 141(b) of the Internal Revenue Code, for the Taxable Year Ended December 31, 1943.

| Year | Liability | Assessed | Deficiency |
|----------------------|------------|----------|------------|
| 1943 Income Tax..... | \$7,358.10 | \$ | \$7,358.10 |

In accordance with section 23.16 of Regulations 104 the deficiency shown above will be assessed severally against each corporation named above.

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated May 9, 1945 to your protest dated July 2, 1945 and to the statement made at conferences held.

A copy of this letter and statement has been mailed to your representative, Mr. Harry W. Moore, 215 West Seventh Street, Los Angeles 14, California, in accordance with the authorization contained in the power of attorney executed by you.

Adjustments to Net Income
Taxable Year Ended December 31, 1943

| | | | |
|--|-------------|-------------|---------------|
| Consolidated net income as disclosed by return (loss)..... | | | (\$23,012.20) |
| Unallowable deductions: | | | |
| Capital Service, Inc. | | | |
| (a) Net operating loss deduction | | | |
| disallowed | \$27,492.98 | | |
| A and W Baking Company | | | |
| (Name changed to Danish Maid Bakery) | | | |
| (b) Wages and salaries disallowed..... | 1,500.00 | | |
| (c) Reserves disallowed | 12,557.08 | | |
| (d) Accrued Interest | 957.36 | | |
| (e) Adjustment to net operating loss | | | |
| deduction | 13,023.82 | 55,531.24 | |
| Total | | \$32,519.04 | |
| Additional deductions: | | | |
| (f) Mathematical error | \$ 270.00 | | |
| Capital Service, Inc. | | | |
| (g) Depreciation | 1,647.42 | | |
| (h) Interest | 758.10 | | |
| A and W Baking Company | | | |
| (i) Taxes | 4,193.74 | | |
| (j) Depreciation | 453.23 | 7,322.49 | |
| Consolidated net income adjusted..... | | \$25,196.55 | |

Explanation of Adjustments

(a) The net operating loss deduction claimed by Capital Service, Inc., in the amount of \$27,492.98, representing a net operating loss carryover from the taxable year ended December 31, 1942, is disallowed. It has been determined that, for the taxable year ended December 31, 1942, you had a net income, exclusive of net operating loss deduction, of \$1,271.30 as shown in the following:

| | | |
|---|---------------|-------------|
| Net loss of Capital Service, Inc., as disclosed by re- turn for taxable year ended 12/31/42..... | (\$27,492.98) | |
| Unallowable deduction: | | |
| (1) Bad debt and loss on stock disallowed..... | 32,867.81 | |
| | <hr/> | |
| Total | | \$ 5,374.83 |
| Additional deductions: | | |
| (2) Depreciation | \$2,653.29 | |
| (3) Interest | 1,450.24 | 4,103.53 |
| | <hr/> | <hr/> |
| Net income adjusted (excluding net oper- ating loss deduction) | | \$ 1,271.30 |

Explanation

(1) Deductions claimed on your 1942 return in the amounts of \$31,567.81 and \$1,300.00, representing an alleged bad debt and an alleged loss on stock, respectively, have been disallowed since such amounts do not constitute allowable deductions under section 23 of the Internal Revenue Code.

(2) A deduction is allowed for depreciation, not previously claimed by you, in the amount of \$2,653.29.

(3) A deduction is allowed for interest, not previously claimed by you, in the amount of \$1,450.24.

(b) It has been determined that wages and salaries in the amount of \$1,500.00 were paid in contravention of the Emergency Price Control Act of October 2, 1942. The deduction claimed with respect to such wages and salaries is disallowed.

(c) The deductions claimed for reserve for bank account, \$3,057.08, and reserve for officer's salary adjustment, \$9,500.00, or a total of \$12,557.08 are disallowed as not representing proper deductions for this taxable year under section 23 of the Internal Revenue Code.

(d) It is determined that the correct deduction for interest, under section 23(b) of the Internal Revenue Code, is the amount of \$2,704.07 instead of the amount claimed, \$3,661.43, or a decrease of \$957.36.

(e) The net operating loss deduction of \$21,705.81 claimed by A and W Baking Company as a net operating loss carryover from the taxable year ended December 31, 1942 is disallowed. It has been determined that that corporation had a net income (exclusive of net operating loss deduction) of \$5,685.22 for that taxable year as shown in the following:

| | | | |
|--|-------------|-----------|---------------|
| Net loss as disclosed by return for taxable year ended December 31, 1942..... | | | (\$21,705.81) |
| Unallowable deductions: | | | |
| (1) Net operating loss deduction excluded | \$25,563.53 | | |
| (2) Wages and salaries disallowed.. | 1,500.00 | | |
| (3) Interest | 697.21 | | |
| (4) Excessive depreciation | 255.29 | 28,016.03 | |
| Total | | | \$ 6,310.22 |
| Additional deduction: | | | |
| (5) Capital stock tax..... | | | 625.00 |
| Net income (exclusive of net operating loss deduction) | | | \$ 5,685.22 |

Explanation

(1) For the purpose of computing a net operating loss carryover a deduction for net operating loss deduction is not allowable. Section 23.31(d) (1)(ii) of Regulations 104 prescribed by section 141(b) of the Internal Revenue Code.

(2) It is determined that salaries and wages in the amount of \$1,500.00 were paid in contravention

of the Emergency Price Control Act of October 2, 1942. The deduction claimed with respect to such wages and salaries is disallowed.

(3) It is determined that the correct deduction for interest, under section 23(b) of the Internal Revenue Code, is the amount of \$1,483.95 instead of the amount claimed, \$2,181.16, or a decrease of \$697.21.

(4) It is determined that a reasonable allowance for depreciation, under section 23(1) of the Internal Revenue Code, is the amount of \$1,868.16 instead of the amount claimed, \$2,123.45, or a decrease of \$255.29.

(5) A deduction is allowed for capital stock tax, not previously claimed, in the amount of \$625.00.

In lieu of the net operating loss deduction claimed by A and W Baking Company in the amount of \$21,705.81 as shown above, it is determined that the correct amount of net operating loss deduction, representing a net operating loss carryover from the taxable year ended December 31, 1941, is \$8,681.99, or a decrease of \$13,023.82.

(f) A mathematical error was made in addition of items of deductions on your return. The correct total of deductions appearing in items 16 to 29, inclusive, is \$145,848.52 instead of the amount, \$145,-578.52, shown in item 30 of your return, or an increase of \$270.00. The return does not indicate to which corporation this difference is applicable.

(g) A deduction is allowed for depreciation, not previously claimed, in the amount of \$1,647.42.

(h) A deduction is allowed for interest, not previously claimed, in the amount of \$758.10.

(i) It is determined that the correct deduction for taxes is the amount of \$13,275.66 instead of the amount claimed, \$9,081.92, or an increase of \$4,193.74.

(j) An additional deduction is allowed for depreciation in the amount of \$453.23 in accordance with section 23(1) of the Internal Revenue Code.

Computation of Income Tax

Taxable Year Ended December 31, 1943

| | | | |
|---|------------|-------------|-------|
| Consolidated net income adjusted..... | | \$25,196.55 | |
| Consolidated normal-tax net income..... | | 25,196.55 | |
| Consolidated surtax net income..... | | 25,196.55 | |
| Income tax: | | | |
| Normal tax: | | | |
| Tax on \$25,000.00..... | \$4,250.00 | | |
| 31% of \$ 196.55..... | 60.93 | \$ 4,310.93 | |
| | | | <hr/> |
| Surtax: | | | |
| 12% of \$25,000.00..... | \$3,000.00 | | |
| 24% of \$ 196.55..... | 47.17 | 3,047.17 | |
| | | | <hr/> |
| Correct income tax liability..... | | \$ 7,358.10 | |
| Income tax assessed: | | | |
| Original, account No. NC-851416..... | | | <hr/> |
| Deficiency of income tax..... | | \$ 7,358.10 | |

Received and filed April 17, 1947, T.C.U.S.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the

above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the tax in controversy is Income Tax for the year 1943; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. Admits that the Tax Court has jurisdiction in the above matter under Section 272 of the Internal Revenue Code, but denies all other allegations contained in paragraph 4 of the petition.

5. Denies all allegations of fact contained in paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ J. P. WENCHEL, ECC
Chief Counsel,
Bureau of Internal
Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,

B. M. COON,
Special Attorneys,
Bureau of Internal Revenue.

Received and filed May 28, 1947, T.C.U.S.

[Title of Tax Court and Cause.]

REQUEST FOR DESIGNATION OF
PLACE OF HEARING

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and in accordance with Rule 26 of the Court's Rules of Practice,

Requests that the Court designate that the hearing in the above-entitled proceeding be held at Los Angeles, California, or vicinity, in order to afford the respective parties an opportunity to produce evidence at the trial with a minimum expense.

/s/ J. P. WENCHEL, ECC
Chief Counsel,
Bureau of Internal
Revenue.

Of Counsel:

B. H. NEBLETT,
E. C. CROUTER,
B. M. COON,
Special Attorneys,
Bureau of Internal Revenue.

Received and filed May 28, 1947, T.C.U.S.

[Title of Tax Court and Cause.]

NOTICE OF PLACE OF HEARING

Notice is hereby given that the above entitled proceeding has been placed upon the Los Angeles, Calif., calendar of the Court for hearing on the

merits in due course either in the city named or in the vicinity thereof.

This notice refers only to the place of hearing and not to the time. The parties will be notified in due course of the exact time and place of hearing on the merits.

If either party desires that the hearing on the merits be held at some place other than the place above named, he must so notify the Court within 30 days from the date of this notice, and name the place he prefers. The Court will consider any requests filed as above provided, and if it decides that the place of hearing should be changed, it will so notify the parties.

Service of answer and request is hereby made.

/s/ VICTOR S. MERSCH,

Clerk.

To:

HYMAN SMITH, ESQ.,
812 Chester Williams Bldg.,
215 West Fifth St.,
Los Angeles 13, Calif.

[Title of Tax Court and Cause.]

NOTICE OF SETTING PROCEEDING FOR
HEARING—CIRCUIT CALENDAR

Take Notice that a Division of The Tax Court of the United States will sit in Room 229, U. S. Post Office & Court House beginning April 26, 1948. Los Angeles, Calif.

Hearing will be held in all proceedings shown on

the attached list. The list will be called promptly at 10:00 a.m., as indicated, and you will be expected to answer the call at that time and be prepared for trial when reached. No continuance will be granted except for extraordinary cause. Failure to appear will be taken for cause for dismissal in accordance with the Rules of Practice, and you are in all other respects expected to be familiar with such rules.

Respectfully,

/s/ VICTOR S. MERSCH,

Clerk.

To:

HYMAN SMITH, ESQ.,

812 Chester Williams Bldg.,

215 West Fifth St.,

Los Angeles 13, Calif.

[Title of Tax Court and Cause.]

MOTION FOR LEAVE TO FILE IN
AMENDED PETITION

Comes now petitioner and asks leave of the Court to file an amended petition herein.

May 5, 1948.

/s/ CHARLES M. WALKER,

Counsel for Petitioner.

Filed at May 5, 1948, T.C.U.S.

Granted May 5, 1948.

/s/ WILLIAM W. ARNOLD,

Judge.

[Title of Tax Court and Cause.]

AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency LA:IT:90D:PAK, dated January 30, 1947, and as a basis of this proceeding alleges as follows:

1. Petitioner is a California corporation, incorporated under the laws of the State of California on April 23, 1936, with its principal office at 510 South Spring Street, Los Angeles 13, California. Consolidated returns for the affiliated group consisting of Capital Service, Inc., the parent, and A. & W. Baking Company (name changed to Danish Maid Bakery), the subsidiary, for the taxable years 1942 and 1943 were properly filed with the Collector of Internal Revenue for the Sixth District of California by petitioner as the parent corporation.

2. The Notice of Deficiency, a copy of which is attached to the Petition on file herein and marked "Exhibit A" thereto, was mailed to petitioner on January 30, 1947.

3. The taxes in controversy are Income Taxes for the taxable year ended December 31, 1943 in the full amount of the asserted deficiency of \$7,358.10.

4. The determination of deficiency in tax set forth in said notice of deficiency is based upon the following errors:

(a) Respondent erred in determining that the petitioner, Capital Service, Inc., did not sustain any

net operating loss in 1942 which could be carried over as a part of a consolidated net operating loss deduction of the affiliated group for 1943.

(b) Respondent erred in failing to allow deduction of \$2,752.49 by petitioner from its consolidated 1943 income, representing a net operating loss for 1941 of Capital Service, Inc., carried over into 1943.

(c) Respondent erred in determining that, for the taxable year ended December 31, 1942, petitioner, Capital Service, Inc., had a net income, exclusive of net operating loss deduction, of \$1,271.30, and in failing to determine that, for said year, petitioner, Capital Service, Inc., sustained a net operating loss of \$31,596.51 within the meaning of Section 122(a), I. R. C.

(d) Respondent erred in determining that a deduction claimed on the consolidated 1942 return of petitioner in the amount of \$31,567.81, representing a debt which became worthless in 1942, did not constitute an allowable deduction in 1942 under Section 23 of the Internal Revenue Code.

(e) Respondent erred in determining that a deduction claimed in the consolidated 1942 return of petitioner in the amount of \$1,300.00, representing a loss which was sustained in 1942, upon the worthlessness of stock, did not constitute an allowable deduction for 1942 under Section 23 of the Internal Revenue Code.

(f) Respondent erred in determining that, for the taxable year ended December 31, 1943, there was a deficiency in income tax of \$7,358.10 or of any sum whatsoever.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

(a) In 1940 and 1941, Capital Service, Inc., and its subsidiary A. & W. Baking Company (name changed to Danish Maid Bakery, and hereinafter referred to as the Bakery) each filed an income tax return. In 1940, the Bakery sustained a net operating loss of \$17,846.84. In 1940, Capital Service, Inc., hereinafter referred to as petitioner, sustained a net operating loss of \$7,082.40. In 1941, the Bakery sustained a net operating loss of \$8,681.99. In 1941, petitioner sustained a net operating loss of \$2,752.49.

(b) In 1942 and 1943, Capital Service, Inc. and the Bakery filed consolidated returns. In 1942, the Bakery had a net income, exclusive of a net operating loss deduction, of \$5,685.22. In 1942, a net operating loss of \$27,492.98, was reported for petitioner, Capital Service, Inc. In arriving at said loss, petitioner deducted upon the grounds of worthlessness: (1) an indebtedness of \$31,567.81 owed to petitioner by Central California Utilities Corporation. (2) The \$1,300.00 adjusted basis to petitioner of 1,050 shares of Central California Utilities Corporation. The aggregate deduction thus taken by petitioner was \$32,867.81. In the deficiency notice herein, respondent disallowed said deduction of \$32,867.81 and determined that, with \$4,103.53 of deductions not claimed by petitioner for 1942 but allowed by respondent, petitioner's adjusted net income for 1942, excluding net operating loss deductions, was \$1,271.30. If petitioner was correct

in deducting the aforesaid \$32,867.81 from 1942 income, then there was a consolidated net operating loss in 1942 of \$31,596.51, being the \$27,492.98 shown on the return, plus \$4,103.53 additional deductions allowed by respondent.

(c) In the 1943 consolidated return, the consolidated net income, exclusive of a net operating loss deduction, was reported to be \$26,186.59. In the deficiency notice herein, respondent has increased said income by \$7,691.95 to \$33,878.54. Net operating losses of petitioner and the Bakery carried over from 1941 and 1942 reduce the said income to zero.

(d) At all times prior to January 1, 1942, the indebtedness owed by the Central California Utilities Corporation to petitioner and petitioner's 1,050 shares of stock in Central California Utilities Corporation were not worthless, and they became worthless during 1942. The reason that no worthlessness occurred prior to January 1, 1942 was that Central California Utilities Corporation owned all the issued and outstanding capital stock of Gas Fuel Service Company and the corporation last named held an exclusive right from the State of California for the transmission and distribution of gas in Kings and Fresno Counties, California. This exclusive right was kept alive by Gas Fuel Service Company as long as the Company believed that there were potentially profitable operations which could be undertaken which would inure to the benefit of the creditors and stockholders of Central California Utilities Corporation. When the Company

determined that such operations could not be undertaken it ceased from its activities which had kept the right alive and permitted the right to be revoked. Said right was held by Gas Fuel Service Company at all times from August 28, 1933, until October 6, 1942, when it was revoked.

Wherefore, petitioner prays that this Court determine that there is no deficiency in income tax, and grant such other and further relief as may be equitable in the premises.

May 5, 1948, Los Angeles, California.

/s/ JOSEPH D. BRADY,

/s/ JOHN O. PAULSTON,

/s/ CHARLES M. WALKER.

State of California,
County of Los Angeles—ss.

M. B. Price, being duly sworn, says:

That he is Vice-President of Capital Service, Inc. the petitioner above named; that he is duly authorized to verify the foregoing amended petition; that he has read the foregoing amended petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true except those stated to be information and belief, and that those be believes to be true.

/s/ M. B. PRICE.

Subscribed and sworn before me this 4th day of May, 1938.

[Seal] /s/ HYMAN SMITH,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires April 25, 1950.

Filed May 5, 1948, T.C.U.S.

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

1 to 3, inclusive. Admits the allegations contained in paragraphs 1 to 3, inclusive, of the amended petition.

4(a) to (f), inclusive. Denies the allegations of error contained in subparagraphs (a) to (f), inclusive, of paragraph 4 of the amended petition.

5(a). Admits the allegations contained in subparagraph (a) of paragraph 5 of the amended petition.

(b). Admits the allegations contained in subparagraph (b) of paragraph 5 of the amended petition except that respondent denies that there would be a consolidated net operating loss in 1942 of \$31,596.51 even if the Court should decide in favor of petitioner on the worthlessness issue.

(c). Denies the allegations contained in subparagraph (c) of paragraph 5 of the amended petition.

(d). Denies the allegations contained in sub-

paragraph (d) of paragraph 5 of the amended petition.

6. Denies each and every allegation contained in the amended petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel,
Bureau of Internal
Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

E. C. CROUTER,
R. E. MAIDEN, JR.,
Special Attorneys,
Bureau of Internal Revenue.

Copy served.

Filed May 6, 1948, T.C.U.S.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated that the following are facts in this case. Either party shall be at liberty to introduce any proper evidence relevant to any of

the issues in the case not inconsistent with the facts herein stipulated.

1. Capital Service, Inc. is a California corporation, formed April 23, 1936.

2. For 1940 and 1941, Capital Service, Inc., and its subsidiary A. & W. Baking Company (name changed to Danish Maid Bakery, and hereinafter referred to as the Bakery) each filed an income tax return. In 1940, the Bakery sustained a net operating loss of \$17,846.84. In 1940, Capital Service, Inc. sustained a net operating loss of \$7,082.40. In 1941, the Bakery sustained a net operating loss of \$8,681.99. In 1941, Capital Service, Inc. sustained a net operating loss of \$2,752.49.

3. For 1942 and 1943, Capital Service, Inc. and the Bakery filed consolidated returns. In 1942, the Bakery had a net income, exclusive of a net operating loss deduction, of \$5,685.22. In the 1942 consolidated return, a net operating loss of \$27,492.98 was reported for Capital Service, Inc. In arriving at said loss, Capital Service, Inc. deducted upon the grounds of worthlessness: (1) an indebtedness of \$31,567.81 owed to it by Central California Utilities Corporation, (2) the \$1,300.00 adjusted basis to Capital Service, Inc. of 1,050 shares of Central California Utilities Corporation. The aggregate deduction thus taken by Capital Service, Inc. in 1942 with reference to the above two items was \$32,867.81. In the deficiency notice herein, respondent disallowed said deduction of \$32,867.81, and determined that, with \$4,103.53 of deductions not claimed by

Capital Service, Inc. for 1942 but allowed by respondent, the adjusted net income of Capital Service, Inc. for 1942, excluding net operating loss deductions, was \$1,271.30.

4. None of the income reported on the 1943 consolidated return of Capital Service, Inc. and the Bakery represented income of Capital Service, Inc.

5. Central California Utilities Corporation, a California corporation, was formed August 3, 1936 for the purpose of taking over the assets and liabilities of the Inland Public Service Company. Continuously after some time in 1933, and prior to the formation of Central California Utilities Corporation in 1936, the Inland Public Service Company owned all of the issued and outstanding stock of Gas Fuel Service Company and Kettleman Lakeview Oil and Gas Co., Ltd. The primary function of Kettleman Lakeview Oil and Gas Co., Ltd. was to own gas producing wells and leases upon which such wells could be drilled, and to produce gas for sale. The primary purpose of Gas Fuel Service Company was to buy gas from Kettleman Lakeview Oil and Gas Co., Ltd. and others and distribute it for sale to customers in Kings and Fresno Counties, California.

6. The acquisition by Central California Utilities Corporation of all of the issued and outstanding shares of Gas Fuel Service Company and of Kettleman Lakeview Oil and Gas Co., Ltd. from Inland Public Service Company occurred on or about September 5, 1936. The certificate of dis-

solution of Inland Public Service Company was filed with the California Secretary of State on March 10, 1937.

7. Attached hereto as joint Exhibit 1-A is a copy of Decision No. 26178 of the opinions and orders of the Railroad Commission of California, dated July 21, 1933.

8. Attached hereto as joint Exhibit 2-B is a copy of Decision No. 26297 of the Railroad Commission of the State of California, dated August 28, 1933.

9. Attached hereto as joint Exhibit 3-C is a certified copy of Ordinance No. 151 of Kings County, California. Said ordinance has never been repealed or amended.

10. Attached hereto as joint Exhibit 4-D is a certified copy of Ordinance No. 290 of Fresno County, California. Said ordinance has never been repealed or modified.

11. Attached hereto as joint Exhibit 5-E is a copy of Application No. 21581 filed November 10, 1937 by Gas Fuel Service Company with the California Railroad Commission.

12. Attached hereto as joint Exhibit 6-F is a copy of Decision No. 30477 of the California Railroad Commission, dated January 3, 1938.

13. Attached hereto as joint Exhibit 7-G is a copy of Decision No. 35825 of the Railroad Commission of the State of California, dated October 6, 1942.

14. Attached hereto as joint Exhibit 8-H is a

copy of a general ledger page from the books of account of Capital Service, Inc., being an account receivable from Central California Utilities Corporation. All of the items appearing as debits to said account represent cash advances by Capital Service, Inc. to or for the benefit of Central California Utilities Corporation, and constituted an indebtedness owing from Central California Utilities Corporation to Capital Service, Inc. On January 1, 1942, said indebtedness was in the amount of \$31,567.81. On December 31, 1942, said indebtedness of \$31,567.81 was charged off the aforesaid account receivable to profit and loss.

15. Capital Service, Inc., at all times material to these proceedings, and since sometime in 1936 owned 1,050 shares of capital stock of Central California Utilities Corporation having an adjusted cost basis of \$1,300.00.

/s/ CHARLES M. WALKER,
Counsel for Petitioner.

/s/ CHARLES OLIPHANT, ECC
Chief Counsel, Bureau of Internal Revenue, Counsel for Respondent.

JOINT EXHIBIT No. 1-A

38 C. R. C. 875-888

Opinions and Orders
of the
Railroad Commission of California

Commissioners: Clyde L. Seavey, President, Leon O. Whitsell, William J. Carr, M. B. Harris, Wallace L. Ware.

Examiners: W. J. Handford, Wm. T. Satterwhite, W. P. Geary, W. C. Fankhauser, Vincent D. Kennedy, Albert L. Johnson.

Decision No. 26178

In The Matter Of The Application Of Gas Fuel Service Company, A Corporation, For A Certificate Of Public Convenience And Necessity Authorizing It To Construct And Operate The Gas Distribution Systems Herein Described, And To Exercise The Franchises Which It Contemplates Acquiring From The Counties Of Kings And Fresno, California.

Application No. 18672

In The Matter Of The Application Of Coast Counties Gas And Electric Company, A Corporation For A Certificate That The Public Convenience And Necessity Requires The Construction By Applicant Of An Extension Of Its Gas System Into Fresno County And The Service Of Natural Gas To The Inhabitants Thereof.

Application No. 18739

In The Matter Of The Application Of West Side Natural Gas Company, A Corporation, For A Certificate That The Public Convenience And Necessity Requires The Exercise By Applicant Of Franchise Privileges In Certain Territory In Kings County And Service Of Natural Gas To The Inhabitants Therein.

Application No. 18746

Decided July 21, 1933

Certificates—Gas Utility.—Gas Fuel Service Company authorized to construct and operate a natural gas system in Kings and Fresno Counties. Applications of Coast Counties Gas and Electric Company and West Side Natural Gas Company denied.

Monopoly and Competition.—A certificate not exercised in any particular territory or to any particular class of consumers is not entitled to protection from the Commission after a newcomer, able and willing to render service, has entered the field, and a utility not exercising a certificate should be placed in the same category as a utility without a certificate when competition comes knocking at the door.

Monopoly and Competition. — Certificates are granted to be exercised pursuant to a showing of convenience and necessity and when a utility possesses a certificate granting it the right to serve a territory it should proceed with due diligence to exercise the same within a reason-

able time, and if it does not it has no just cause for complaint when a vigilant and persuasive utility is allowed to enter the field.

Monopoly and Competition.—A utility handling two sources of service (electricity and natural gas) will not be permitted to stifle the development of the cheaper one.

John A. Dundas, G. Everett Miller, and H. A. Savage, for Applicant Gas Fuel Service Company.
Pillsbury, Madison and Sutro, by Hugh Fullerton, for Applicants Coast Counties Gas and Electric Company and West Side Natural Gas Company.

C. P. Cutten, for Pacific Gas and Electric Company and San Joaquin Light and Power Corporation.

H. A. Savage, for San Joaquin Valley Agricultural Power Users Association.

J. J. Deuel and L. S. Wing, for California Farm Bureau Federation and for Kings County Board of Supervisors.

T. J. Reynolds and L. T. Rice, for Southern California Gas Company.

Whitsell, Commissioner.

Opinion

On January 23, 1933, Gas Fuel Service Company, a California corporation, filed Application No. 18672 asking the Commission for an order certifying that public convenience and necessity require and will require the construction and operation of a natural gas transmission and distribution system

for the service of natural gas to the agricultural power users in Fresno and Kings counties and to exercise franchise rights which it contemplates acquiring from said counties.

An amended application was filed on May 10, 1933, which, in effect, eliminated the proposed intermediate transporting pipe line company, increased the number of directors from five to seven, changed the proposed service from "Water Lifting Service" to "Gas Engine Service" and reduced the proposed rate therefor.

On March 1, 1933, Coast Counties Gas and Electric Company, a California corporation, filed Application No. 18739 asking the Commission to issue its certificate that public convenience and necessity require applicant to construct and operate an extension of its natural gas system into Fresno County.

On March 7, 1933, West Side Natural Gas Company, a California corporation, filed Application No. 18746, asking the Commission to issue its certificate that public convenience and necessity require the enlargement of certificate rights granted by Decision No. 23612, dated April 20, 1931, and particularly to exercise franchise rights granted by Ordinance No. 146 of the county of Kings in the areas generally contiguous to the owns of Avenal and Kettleman City and to certain pipe lines of the Standard Oil Company of California.

Southern California Gas Company, a California corporation, entered an appearance and complaint

protesting the granting of a certificate to Gas Fuel Service Company and claimed the right to serve natural gas to consumers of Kings and Fresno counties under a certificate granted to it by the Commission in its Decision No. 21368, dated July 10, 1929.

Public hearings were held in Los Angeles on March 28, 1933, and in Hanford on April 14 and 15 and May 10 and 11, 1933, at which time the matters herein were submitted and are now ready for decision.

The foregoing applications were consolidated for the purpose of hearing and decision.

Gas Fuel Service Company.

The evidence adduced on the part of Gas Fuel Service Company may be succinctly stated as follows:

About three years ago the individuals who later organized this company owned approximately 1500 acres of potential oil and gas lands in what is known as the Dudley Ridge Area in Kings County. The owners of this land organized the Kettleman-Lakeview Gas and Oil Company for the development of their properties. Up to date they have three wells on these properties producing dry gas at a pressure of 510 pounds per square inch with a B.t.u. content of 1012, the average cost per well being approximately \$10,000. Witnesses for applicant estimated the daily production of these wells to be approximately 20,000,000 cubic feet over a period of twenty years. The company sells under contract

1,000,000 cubic feet per day to Pacific Gas and Electric Company and small quantities of gas to others in the vicinity of the wells.

In an effort to find a market for gas over the requirements of the contracts already entered into the owners organized the Gas Fuel Service Company and entered into an active survey to determine the probable extent of the sale of gas among the farmers of Kings and Fresno counties who at the present time use electric power for irrigation purposes. This survey resulted in the filing of this application.

Applicant proposes to construct an 8-inch gas pipe line running from the wells of Kettleman-Lakeview Oil and Gas Company in the Dudley Ridge area in a northerly direction for a distance of approximately thirteen miles to a point approximately three miles southwest of the town of Stratford and from this point applicant will construct a 6-inch pipe line which will run in a northwesterly direction for approximately seventy miles to a point approximately ten miles south of the community of South Dos Palos. In addition to the above transmission lines applicant intends to construct thirty-one miles of 4-inch gas pipe line in the area known as "Tulare Lake" in Kings County and thirty-eight miles of 3-inch gas pipe line in the Fresno County district. Connections from all of the above gas pipe lines will be made by means of 2-inch laterals.

In addition to the supply of gas obtained from

the wells of the Kettleman-Lakeview Oil and Gas Company, applicant has verbal assurances of additional gas, when needed, from producers in the Kettleman Hills district.

In the Kings County territory applicant proposes a flat commodity charge of 16 cents per 1000 cubic feet, with an annual minimum charge to be computed at the rate of \$3.60 per active rated horsepower of connected load per annum, payable in equal monthly installments.

In the Fresno County territory applicant proposes a flat commodity charge of 17 cents per 1000 cubic feet, with the same minimum charge as in the Kings County territory.

Many witnesses appeared on behalf of the applicant and testified that it is not economically feasible to use electric power for irrigation pumping purposes at the rates now charged by the electric utilities serving the areas involved in this application and that the farmers are insistent in their demand that a cheaper source of power be made available; that natural gas can be supplied for pumping of irrigation waters which will result in an over-all saving to the consumer of from one-third to one-half the present costs paid by said consumers. Several farmer witnesses testified that they could personally finance the necessary gas engine facilities in the event the application is granted and they receive gas service.

It developed that there are approximately eighty-one potential gas users in this entire area with a

load approximating 50,000 horsepower. Witnesses for the applicant testified that 80 per cent of the power users in this territory have expressed their willingness and intention to receive gas service in the event the company receives the necessary authorization.

Engineers and officials for the applicant company testified that this company is to be farmer owned, controlled and managed, it being understood and agreed that the stock issued and to be issued shall be pooled under an agreement that at least five of the seven directors shall be farmer-consumers of this company, said pooling agreement to terminate, if at all, when said company has been fully reimbursed out of dividends for all capital outlay.

Evidence was also introduced to the effect that the National Supply Company of California has agreed to supply the consumers of this company with all the necessary gas engine equipment and installation upon a payment of one-fourth down and the balance to be deducted yearly from the "savings effected," said "savings effected" to be figured on the difference in power bills based upon the consumption of gas at the rates proposed by applicant as compared with the present cost of electrical power to the same consumers.

The Gas Fuel Service Company estimates the cost of installing its proposed transmission and distribution lines at approximately \$680,861. Three of the company's witnesses testified that they personally were in a position to invest in the project

amounts aggregating \$200,000 and that if the application is granted they would so invest such sums forthwith to enable construction to commence at once. They testified further that they would accept common stock in payment for such advances and that no common stock would be issued to them for promotion purposes.

As to the financing of the balance of the construction cost, the record shows that negotiations were being had with National Supply Company of California with the end in view of having that company install the lines upon a deferred payment basis. A letter from the company dated May 9, 1933, read into the record, indicates that under certain conditions it may proceed with the installation upon the payment of 25 per cent of the cost at once and of 75 per cent within a reasonable period. The record is not clear when such balance is to be paid, final arrangements apparently not having been made, but it seems to be applicant's desire to obtain such an amount over and above the initial \$200,000 from the earnings from operations over a period of years. As an alternative, should no arrangement be consummated with the National Supply Company of California, it appears from the testimony that those interested in the organization of applicant and of Kettleman-Lakeview Oil and Gas Company possibly could and would finance the entire estimated cost themselves. No final agreements had been made along either line at the time of hearing.

Gas Fuel Service Company does not in this ap-

plication ask permission to issue any stock or evidences of indebtedness. The order herein does not authorize the company to issue any stock nor should it be construed as an approval of any proposed financing. The company's representatives no doubt are aware of the provisions of the Public Utilities Act in regard to the issuance of stock or evidences of indebtedness. I desire to put the company on notice that the Commission does not look with favor on the issue of no par stock for less than \$25 per share, nor does it believe that any undue charges in the form of interest or principal payments or contingent charges in the form of preferred stock dividends should be imposed on the company.

Coast Counties Gas and Electric Company.

Mr. Charles Grunsky, chief engineer for the applicants, Coast Counties Gas and Electric Company and West Side Natural Gas Company, appeared as a witness and his testimony may be summarized as follows:

Applicant Coast Counties Gas and Electric Company, is at present serving natural gas in the area centering about the communities of Gustine, Los Banos, Dos Palos and South Dos Palos, in Merced County, and proposes to extend its natural gas system to that portion of Fresno County contiguous to the pipe lines of the Standard Pacific Gas Line, Inc., Coast Natural Gas Company and Standard Oil Company of California, and serve gas from these lines to consumers within Fresno County under rates now on file with the Commission, said gas to

be served to supply all fuel requirements, domestic, commercial and industrial, within the proposed area. He testified that applicant has agreements with gas producers guaranteeing a sufficient supply of gas to meet all requirements and that the average rates under which it proposes to serve gas for agricultural pumping purposes in this territory would be 25 cents per 1000 cubic feet, approximately 8 cents per 1000 cubic feet higher than the proposed rates of the Gas Fuel Service Company;¹ that the gas proposed to be served by his company is of that heat content approximating 1200 B.t.u., while the gas of the Gas Fuel Service Company has a heat content of only 1012 B.t.u. He testified further that gas can be served by his company under its rates, which will effect a saving of approximately 50 per cent to the farmers under the electric rates now being *paid these* consumers. From surveys made on behalf of his company he testified that public con-

¹The following is a comparison between the rate for Gas Engine Service now on file by Coast Counties Gas and Electric Company and the rate (5 cents lower) that it proposes for Fresno County:

| | | Rate per 1000 cu. ft. | |
|-------------|---|-----------------------|---------------|
| | | Schedule No. 4 | Proposed Rate |
| Consumption | | | |
| First | 100,000 cu. ft. per meter per month | \$0.40 | \$0.35 |
| Next | 400,000 cu. ft. per meter per month | .35 | .30 |
| Next | 500,000 cu. ft. per meter per month | .30 | .25 |
| Over | 1,000,000 cu. ft. per meter per month | .25 | .20 |

Minimum charge:

April to October, inclusive.....\$5.00 per meter per month but not less than 25 cents per month per h.p. of connected load.

November to March, inclusive..\$1.00 per meter per month.

venience and necessity require the granting of the certificate and that applicant, sometime prior to January 1, 1933, solicited business from at least one consumer in the proposed service area, but without success.

He also testified that applicant, West Side Natural Gas Company, now serves natural gas to consumers in Taft, Maricopa, Fellows, Avenal and Kettleman City and is asking authority to serve that territory on the east and west flanks of Kettleman Hills and along the Standard Oil Company's oil pipe line from a point adjacent to Corcoran north to the Fresno County boundary line; that the proposed rate for this area is 25 cents per 1000 cubic feet, the same as the proposed Coast Counties Gas and Electric Company rate; that the heating values of the gas used vary from 950 to 1050 B.t.u. per cubic foot and that no solicitation has been made in this area.

Southern California Gas Company.

Mr. T. J. Reynolds, vice president and general counsel, and Mr. F. M. Banks, general superintendent in charge of sales, both representing Southern California Gas Company, testified that surveys had been made that indicated that it would not be feasible for said utility to extend its service of natural gas to agricultural power consumers in Kings or Fresno counties unless a substantial number of prospective consumers (something approaching 80 per cent) could be signed up to take service; that thus far the utility had been unable to secure the signatures of enough of said consumers to guar-

antee to it what it considered a reasonable return on the investment involved; that its estimates were based upon its presently filed Schedules Nos. E-6 and E-7;² that said utility did exercise its certificates in Kings and Fresno counties in the laying of transmission lines to serve its San Joaquin Valley division and for the transportation of Pacific Gas and Electric Company gas to Fresno; that

²Schedules E-6 and E-7 of Southern California Gas Company are higher rates than the rates proposed by applicant, Gas Fuel Service Company. They cover the service of natural gas for internal combustion engines in Southern California Gas Company's Rate Districts 40, 41, 42, 43 and 45, San Joaquin Valley Division, including the cities of Hanford, Lemoore, Visalia, Tulare, Exeter, Lindsay, Porterville, Kingsburg, Reedley, Dinuba, Parlier, Corcoran and the communities of Orosi, Armona, Caruthers, Cutler, Riverdale, Strathmore and Sultana and territory adjacent thereto, traversed by natural gas mains, where capacity of mains is sufficient to supply demands without detriment to existing service.

The rates are as follows:

Schedule E-6:

Demand charge per active rated horsepower per month, 30 cents.

Commodity charge (to be added to demand charge):

First 3000 cu. ft. per active rated h.p. per mo.
2.0 cents per 100 cu. ft.

Over 3000 cu. ft. per active rated h.p. per mo.
1.7 cents per 100 cu. ft.

Minimum charge:

From May to October, inclusive:

For 15 active rated h.p. or less, \$4.50 per meter per month.

Over 15 active rated h.p., demand charge as above.

From November to April, inclusive:

Southern California Gas Company does not desire to serve agricultural power consumers in that portion of Fresno County covered in the application of Gas Fuel Service Company for the reason that said area is too far from the lines of said Southern California Gas Company, but that it is desirous of serving in the Tulare Lake bed area of Kings County.

\$1.25 per meter per month.

Scheduled E-7 (optional with Schedule E-6):

First 50,000 cu. ft. per meter per month, 4.0 cents per 100 cu. ft.

Next 50,000 cu. ft. per meter per month, 3.0 cents per 100 cu. ft.

Next 50,000 cu. ft. per meter per month, 2.5 cents per 100 cu. ft.

Over 150,000 cu. ft. per meter per month, 2.2 cents per 100 cu. ft.

Monthly and Annual Quantity Discounts:

Less monthly discount of thirty (30) per cent on the amount billed monthly under the above schedule, in excess of the following, and less annual quantity discount of fifteen (15) per cent on the amount of the aggregated twelve (12) months' consecutive billings, under the above schedule less monthly discount, in excess of the following:

| Rated connected Horsepower of installation | Monthly discount | Annual discount |
|---|---|--|
| | 30% in excess of monthly billing of cu. ft./h.p./meter | 15% in excess of twelve times monthly billing of cu. ft./h.p./meter |
| Up to 30 h.p..... | 600 | 600 |
| 31 to 60 h.p..... | 1,100 | 1,100 |
| 61 to 90 h.p..... | 1,800 | 1,800 |
| 91 to 120 h.p..... | 1,900 | 1,900 |
| 121 to 160 h.p..... | 2,300 | 2,300 |
| 161 to 220 h.p..... | 2,400 | 2,400 |
| 221 to 300 h.p..... | 2,900 | 2,900 |
| Over 300 h.p..... | 3,000 | 3,000 |

Minimum charge (not subject to discount):

From May to October, inclusive, \$5 per meter per month.

From November to April, inclusive, \$1 per meter per month.

I feel that a certificate not exercised in any particular territory or to any particular class of consumers is not entitled to protection from the Commission after a newcomer, able and willing to render service, has entered the field. A utility not exercising a certificate should be placed in the same category as a utility without a certificate when competition comes knocking at the door. Certificates are granted to be exercised pursuant to a showing of convenience and necessity and when a utility possesses a certificate which grants it the right to serve a territory it should proceed with due diligence to exercise the same within a reasonable time and the utility which has failed to render service its certificate has no just cause for complaint when the Commission allows a vigilant and persuasive utility to enter the field.

The granting of a certificate to applicant will undoubtedly affect the revenue of electric service in this territory. This, however, is not a new situation, as gas has been invading the electric field for a number of years and the electric utilities have been forewarned. In fact the major electric company in this territory also distributes gas. This Commission will not permit a utility handling two sources of service to stifle the development of the cheaper one. The consumers in this farming district are entitled to any and all financial relief that may accrue to them through this medium of lower priced power.

It is evident from the record that more than

one certificate should not be granted for the service of natural gas to the agricultural power users in the territory involved. The applications of Coast Counties Gas and Electric Company and West Side Natural Gas Company will be denied.

I recommend the following form of order:

Order

Gas Fuel Service Company, Coast Counties Gas and Electric Company and West Side Natural Gas Company having applied to this Commission for certificates of public convenience and necessity authorizing the exercise of franchise rights and the construction of natural gas transmission and distribution systems, all as set forth in these applications, Southern California Gas Company having entered a complaint protesting the granting of a certificate to Gas Fuel Service Company, said applications and complaint having been consolidated for hearing and decision, public hearings having been held thereon, the matters being submitted and now ready for decision:

The Railroad Commission of the State of California hereby orders and declares that public convenience and necessity require and will require the exercise by Gas Fuel Service Company of the rights and privileges granted to it under the franchises which it contemplates securing from the counties of Kings and Fresno, the construction and operation of the natural gas transmission and distribution systems and the service of natural gas under

rates, all as set forth in its amended Application No. 18672, provided that:

(1) The Railroad Commission may hereafter, by appropriate proceedings and orders, revoke or limit, as to territory not then served by Gas Fuel Service Company, or its successors in interest, the authority herein granted.

(2) Gas Fuel Service Company file with this Commission certified copies of the franchises it secures from the counties of Kings and Fresno.

(3) Gas Fuel Service Company file with this Commission a stipulation duly executed on authority of its board of directors agreeing that it will never claim for either of these franchises a value in excess of the actual cost thereof.

(4) Upon the filing of the franchises and stipulation referred to in paragraphs (2) and (3) above, in the proper form, the Commission will issue its supplemental order authorizing the exercise of the rights conferred by such franchises. Said franchises and stipulation shall be filed on or before October 1, 1933.

It is hereby further ordered, that the applications of Coast Counties Gas and Electric Company and West Side Natural Gas Company be and they are hereby denied.

It is hereby further ordered, that the complaint of Southern California Gas Company be and it is hereby dismissed.

The authorization herein granted, except as other-

wise specifically provided, shall be effective from and after the date of this order.

For all other purposes, the effective date of this order shall be twenty days from and after the date hereof.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this twenty-first day of July, 1933.

JOINT EXHIBIT No. 2-B

(Copy)

Before the Railroad Commission of the
State of California.

Decision No. 26297

Application No. 18672

In the Matter of

The Application of GAS FUEL SERVICE COMPANY, a corporation, for a Certificate of Public Convenience and Necessity authorizing it to construct and operate the gas distribution systems herein described, and to exercise the franchises which it contemplates acquiring from the Counties of Kings and Fresno, California.

John A. Dundas, G. Everett Miller, and H. A. Savage for Applicant Gas Fuel Service Company.
Pillsbury, Madison and Sutro, by Hugh Fullerton,

for Applicants Coast Counties Gas and Electric Company and West Side Natural Gas Company.

C. P. Cutten for Pacific Gas and Electric Company and San Joaquin Light and Power Corporation.

H. A. Savage, for San Joaquin Valley Agricultural Power Users Association.

J. J. Deuel and L. S. Wing, for California Farm Bureau Federation and for Kings County Board of Supervisors.

T. J. Reynolds and L. T. Rice for Southern California Gas Company.

By the Commission:

SUPPLEMENTAL OPINION AND ORDER

In its Decision No. 26178, dated July 21, 1933, the Commission ordered that:

“(2) Gas Fuel Service Company file with this Commission certified copies of the franchises it secures from the Counties of Kings and Fresno.

(3) Gas Fuel Service Company file with this Commission a stipulation duly executed on authority of its Board of Directors agreeing that it will never claim for either of these franchises a value in excess of the actual cost thereof.

(4) Upon the filing of the franchises and stipulation referred to in paragraphs (2) and (3) above, in the proper form, the Commission will issue its supplemental order authorizing the exercise of the rights conferred by such franchises. Said franchises

and stipulation shall be filed on or before October 1, 1933.”

Gas Fuel Service Company having filed with the Commission, under date of August 18, 1933, the franchises and stipulation referred to above, in proper form,

The Railroad Commission of the State of California Hereby Orders that a certificate of public convenience and necessity be and it is hereby granted to Gas Fuel Service Company authorizing said utility to exercise the rights and privileges granted to it under Ordinance No. 151 of the County of Kings and Ordinance No. 290 of the County of Fresno, provided that the Commission may hereafter, by appropriate proceedings and orders, revoke or limit, as to territory not then served by Gas Fuel Service Company, or its successors in interest, the authority herein granted.

The effective date of this order shall be from and after the date hereof.

Dated at San Francisco, California, this 28th day of August, 1933.

C. L. SEAVEY,
LEON O. WHITSELL,
W. J. CARR,
M. B. HARRIS,
Commissioners.

Certified As A True Copy

.....
Secretary, Railroad Commission
State of California

JOINT EXHIBIT No. 3-C

Ordinance No. 151

Ordinance of the Board of Supervisors of the County of Kings, State of California, granting to Gas Fuel Service Company, a corporation, its successors or assigns, the right, privilege, and franchise to lay and construct and to thereafter operate, maintain, repair and/or replace a system of conduits and pipelines, together with such fixtures or appurtenances as the grantee, its successors or assigns may deem necessary or convenient in connection therewith, in, under, along or across all public streets, highways and/or alleys of said county for the purpose of transmitting and/or distributing gas to the public for light, heat, fuel, power or any other lawful purposes, for the term of fifty (50) years.

The Board of Supervisors of the County of Kings do ordain as follows:

Section 1.

The right, privilege and franchise to lay and construct and to thereafter operate, maintain, repair and/or replace a system of conduits and pipelines, together with such fixtures or appurtenances as the grantee, its successors or assigns, may deem necessary or convenient in connection therewith, in, under, along or across all public streets, highways and/or alleys of said County, for the purpose of transmitting and/or distributing gas to the public for light, heat, fuel, power, and any other lawful

purposes for the term of fifty (50) years from and after the effective date of this ordinance are hereby granted to Gas Fuel Service Company, a corporation, its successors or assigns.

Section 2.

All gas pipes, mains and other conduits which shall be laid and used under and pursuant to the provisions of this ordinance and in the exercise of the right, privilege and franchise herein granted shall be of iron, or other suitable material, and shall be of such dimensions as the owner for the time being of said right, privilege and franchise shall determine. All such gas pipes, mains and conduits shall be laid in a good and workmanlike manner at least eighteen (18) inches below the surface of said streets, highways and/or alleys under the direction of the County Engineer of the County of Kings or other officer having charge thereof.

Section 3.

The right, privilege and franchise hereby granted is not exclusive, and the right of the said County to grant like rights, privileges, and franchises to others is hereby reserved provided that such grants shall not interfere with the reasonable use of the rights granted hereunder.

Section 4.

The grantee herein and his assigns must, during the life of said franchise, pay to the County of Kings, two per cent (2%) of the gross annual receipt arising from its use, operation, or posses-

sion. No percentage shall be paid for the first five (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable annually; and in the event said payment is not made, said franchise shall be forfeited.

Section 5.

Work under said right, privilege and franchise shall be commenced within not more than four (4) months from the granting thereof, and if not so commenced shall be declared forfeited. Said work shall be completed within a reasonable time. The grantee herein must save and keep harmless the County of Kings from damages due to construction and maintenance of said conduits, pipelines, fixtures and appurtenances.

Section 6.

This ordinance shall take effect and be in force thirty (30) days from and after its passage and approval.

Introduced, adopted and passed by said Board of Supervisors, at a regular meeting held on the 15th day of May, 1933, by the following vote:

Ayes: Grant Garner Supervisors

J. H. McGlashan

H. M. Nelson Supervisors

S. E. Railsback

Absent: T. E. Cochrane, Supervisor.

Noes: None

S. E. RAILSBACK

Chairman of the Board of Supervisors of the
County of Kings, State of California.

Attest:

[Seal] E. F. PICKERILL

Clerk of the Board of Supervisors of the County
of Kings, State of California.

By MARJORIE BOYD,
Deputy.

[Endorsed]: Filed May 15, 1933.

State of California,
County of Kings—ss.

I, E. F. Pickerill, County Clerk and ex-officio
Clerk of the Board of Supervisors of said County
and State, do hereby certify the foregoing to be a
full, true and correct copy of the original thereof
on file in my office.

Witness my hand and seal of said Board, this
23rd day of April, 1948. E. F. Pickerill, Clerk of
said Board.

[Seal] By /s/ VERNICE THOMSEN,
Deputy Clerk.

Kings County
Board of Supervisors
Hanford, California

State of California,
County of Kings—ss.

I, E. F. Pickerill, County Clerk and ex-officio
Clerk of the Board of Supervisors of the County

of Kings, State of California, do hereby certify that Kings County Ordinance No. 151, which was adopted by the Board of Supervisors of the said County and State, has not been repealed nor amended.

A certified copy of said Ordinance is hereto attached.

In Witness Whereof, I have hereunto set my hand and official seal this 23rd day of April, 1948.

E. F. PICKERILL,

County Clerk and ex-officio Clerk of the Board of Supervisors of the County of Kings, State of California.

[Seal] By /s/ VERNICE THOMSEN,
Deputy.

JOINT EXHIBIT 4-D

(Copy)

Ordinance No. 290

Ordinance of the Board of Supervisors of the County of Fresno, State of California, granting to Gas Fuel Service Company, a corporation, its successors or assigns, the right, privilege, and franchise to lay and construct and to thereafter operate, maintain, repair and/or replace a system of conduits and pipelines, together with such fixtures or appurtenances as the grantee, its successors or assigns may deem necessary or convenient in connection therewith, in, under, along or across all public streets, highways and/or alleys of said county for the purpose

of transmitting and/or distributing gas to the public for light, heat, fuel, power or any other lawful purposes, for the term of fifty (50) years.

The Board of Supervisors of the County of Fresno do ordain as follows:

Section 1.

The right, privilege and franchise to lay and construct and to thereafter operate, maintain, repair and/or replace a system of conduits and pipelines, together with such fixtures or appurtenances as the grantee, its successors or assigns, may deem necessary or convenient in connection therewith, in, under, along or across all public streets, highways and/or alleys of said County, for the purpose of transmitting and/or distributing gas to the public for light, heat, fuel, power, and any other lawful purposes for the term of fifty (50) years from and after the effective date of this ordinance are hereby granted to Gas Fuel Service Company, a corporation, its successors or assigns.

Section 2.

All gas pipes, mains and other conduits which shall be laid and used under and pursuant to the provisions of this ordinance and in the exercise of the right, privilege and franchise herein granted shall be of iron, or other suitable material, and shall be of such dimensions as the owner for the time being of said right, privilege and franchise shall determine. All such gas pipes, mains and conduits shall be laid in

a good and workmanlike manner at least eighteen (18) inches below the surface of said streets, highways and/or alleys under the direction of the County Engineer of the County of Fresno or other officer having charge thereof. Any pipe line, main, conduit, installed or maintained under and pursuant to the provisions of this ordinance and in exercise of the right, privilege and franchise herein granted, shall be so installed and maintained under and in accordance with such reasonable directions and plans as may be given by the Board of Supervisors of Fresno County, or its duly authorized representative, and shall be subject to the posting of such bonds for the replacing of highways as may hereafter be required by any ordinance of the County of Fresno, and all reasonable care shall be exercised to prevent inconvenience or damage to the traveling public by virtue of any construction or maintenance work done under this franchise.

Section 3.

Any highway damaged or torn up by any construction or maintenance work done under the right, privilege and franchise herein granted shall be repaired and replaced as soon as is reasonably possible after the completion of such construction or maintenance work, in as good condition as said highway was at the commencement of such construction or maintenance work, and the grantee of this franchise, its successors or assigns, shall hold the County of Fresno harmless from any and all damage to third parties resulting from the laying, use or operation of any pipes, mains, conduits or

works of any kind or description, laid, used or operated under the terms of this franchise.

Section 4.

The grantee of this right, privilege and franchise, its successors and assigns, shall at such times as the Board of Supervisors of Fresno County shall request, but not oftener than once each year, beginning one year from the date of the granting of this right, privilege and franchise, prepare and file with the Board of Supervisors of the County of Fresno, a map or maps, on a scale as large as two inches to one mile, or in lieu thereof a written statement clearly and intelligibly setting forth in complete detail, showing the location of any and all mains and lateral pipe lines and conduits on the public highways of said County as of the date of said request.

Section 5.

The right, privilege and franchise hereby granted is not exclusive, and the right of the said County to grant like rights, privileges and franchises to others is hereby reserved, provided, that such grants shall not interfere with the reasonable use of the rights granted hereunder.

Section 6.

The grantee herein and his assigns must, during the life of said franchise, pay to the County of Fresno, two per cent (2%) of the gross annual receipts arising from its use, operation or possession. No percentage shall be paid for the first five (5) years succeeding the date of the franchise, but thereafter such percentage shall be payable an-

nually; and in the event said payment is not made, said franchise shall be forfeited.

Section 7.

Commencing at the end of the sixth year from the date of the granting of this franchise, the grantee, its successors and assigns, shall, if requested, by the Board of Supervisors of Fresno County, furnish to said Board of Supervisors a statement in writing showing the gross receipts of said grantee received from each consumer connected with its system located and maintained under this franchise for the preceding twelve (12) months, and each and every year thereafter during the life of this franchise, the grantee shall, if so requested by the said Board of Supervisors, furnish to said Board a like statement covering the year preceding the date of the rendition of said accounting. Such accounting shall cover the period for which the yearly payments are made. Grantor may at any reasonable time, through an authorized agent of its Board of Supervisors, examine grantee's books for the purpose of verifying the accounting above provided for.

Section 8.

Work under said right, privilege and franchise shall be commenced within not more than four (4) months from the granting thereof, and if not so commenced shall be declared forfeited. Said work shall be completed within a reasonable time. The grantee herein must save and keep harmless the County of Fresno from damages due to construc-

tion and maintenance of said conduits, pipelines, fixtures and appurtenances.

Section 9.

The neglect, failure or refusal on the part of said grantee, its successors or assigns, to comply with, keep and observe the terms and conditions of the franchise and privilege herein granted, shall be cause of forfeiture of said franchise and privilege.

Section 10.

This ordinance shall take effect and be in force thirty (30) days from and after its passage and approval.

Introduced, adopted and passed by said Board of Supervisors, at a regular meeting held on the 5th day of May, 1933, by the following vote:

Ayes: Supervisors McMurtry, Collins, Jones,
Clark, Gonser

Noes: Supervisors None

Absent: Supervisors None

/s/ N. P. GONSER,

Chairman of the Board of Supervisors of the
County of Fresno, State of California.

Attest:

D. M. BARNWELL

Clerk of the Board of Supervisors of the County
of Fresno, State of California.

[Seal] By FRED E. MAIN,
Deputy

State of California,
County of Fresno—ss.

I, E. Dusenberry, County Clerk and ex-officio
Clerk of the Board of Supervisors of said Fresno

County, do hereby certify the foregoing to be a full, true and correct copy of the original Ordinance No. 290 now of record in my office.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Board of Supervisors this 23rd day of April, 1948.

E. DUSENBERRY,

County Clerk and Ex-officio Clerk of said Board of Supervisors.

[Seal] By /s/ GEO. M. FURNEAUX,
Deputy Clerk.

County of Fresno
Fresno, California
April 23, 1948

To Whom It May Concern:

This is to certify that Ordinance No. 290 of the County of Fresno, State of California, granting Franchise to Gas Fuel Service Company, is still in full force and effect on the records of the Clerk of the Board of Supervisors, and that same has not been repealed or modified.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Board of Supervisors this 23rd day of April, 1948.

E. DUSENBERRY,

County Clerk and Ex-officio Clerk of said Board of Supervisors.

[Seal] By /s/ GEO. M. FURNEAUX,
Deputy Clerk.

Filed Railroad Commission, State of California,
August 18, 1933.

JOINT EXHIBIT No. 5-E

(Copy)

Before the Railroad Commission of the
State of California

In the Matter of

The Application of GAS FUEL SERVICE COM-
PANY for permission to temporarily discon-
tinue service in Kings County.

Application

The petition of Gas Fuel Service Company, a
California corporation, respectfully shows:

I.

That the Applicant is engaged in business as a
public utility within the State of California, dis-
tributing natural gas within Kings County.

II.

That the post-office address of Applicant is Room
503, at 510 South Spring Street, in the City of
Los Angeles, County of Los Angeles, State of Cali-
fornia.

III.

That a copy of the Articles of Incorporation of
Applicant and amendments thereto, certified by the
Secretary of State of the State of California, was
heretofore filed with this Commission, in the Matter
of Application No. 18746, bearing date of January
20, 1933.

IV.

That a financial statement of Applicant as of December 31, 1936, has been filed with the Commission with Annual Report for the year 1936.

V.

That Applicant is at present serving with natural gas under its various schedules, approximately ten consumers within the area centering about the community of Stratford in Kings County under conditions that are impossible to maintain.

That due to the failure of Applicant's gas supply from Dudley Ridge, Kings County, last June, a temporary contract to supply gas was entered into with the Southern California Gas Company.

That due to the heavy floods and rains during the last year, Applicant's gas transmission lines show a considerable line loss.

That due to excessive water supply, the use of natural gas for agricultural purposes (the chief business of Applicant) has been very small, thereby exaggerating this line loss to the extent that out of 2,614 MCF of gas delivered into Applicant's lines during the month of October, 1937, only 422.341 cubic feet was recorded on consumers meters.

That Applicant has made a field check of conditions and through its local representative notified its consumers of the possible temporary discontinuance of service, and has noticed no unreasonable bad reaction yet.

That Applicant considers it necessary and advisable to temporarily discontinue service until such

time as its lines can be put in condition to efficiently serve its consumers.

That Applicant estimates that the time required to perform the work necessary is approximately one hundred and twenty (120) days.

VI.

That Applicant's proposed temporary discontinuance of service will not be a detrimental inconvenience to its consumers in as much as the principal business of applicant is the selling of natural gas for supplying water for agricultural purposes, which volume of business has been practically nothing, and is not expected to be required before March, 1938.

VII.

Wherefore, Applicant asks that the Railroad Commission of the State of California permit the temporary discontinuance of Applicant's service for the purposes and reasons hereinabove set forth.

Dated at Los Angeles, California, this 10th day of November, 1937.

GAS FUEL SERVICE COMPANY,

By W. MARTIN LATHROP,
Its Vice-President

State of California,
County of Los Angeles—ss.

W. Martin Lathrop, being first duly sworn, deposes and says: That he is the Vice-President of Applicant, Gas Fuel Service Company, a corpora-

tion, the Applicant named in the foregoing application and makes this affidavit for and on behalf of said corporation; that he has read the foregoing application and knows the contents thereof; and that the same is true of his own knowledge, except as to matters which are therein stated on information or belief, and that as to those matters he believes it to be true.

W. MARTIN LATHROP

Subscribed and sworn to before me, this 10th day of November 1937.

WINSLOW P. HYATT

Notary Public in and for the County of Los Angeles, State of California.

Filed Railroad Commission State of California
Nov. 10, 1937.

JOINT EXHIBIT No. 6-F

(Copy)

Before the Railroad Commission of the
State of California
Decision No. 30477
Application No. 21581

In the Matter of

The Application of GAS FUEL SERVICE COMPANY, for permission: 1. To temporarily discontinue service in Kings County. 2. To revise its Gas Engine Service Schedule within the territory, and 3. To file with the Commission

its schedule for Domestic Service within the territory.

W. Martin Lathrop, for Applicant

By the Commission:

OPINION

The Gas Fuel Service Company asks permission—

1. To temporarily discontinue gas service in Kings County;
2. To revise and increase its Gas Engine Service Schedule No. 1;
3. To file an original General Service Schedule No. 3.

Schedules No. 1 and No. 3 are attached to the application as Exhibits "C" and "D", respectively.

Public hearing was held before Examiner C. C. Brown at Stratford, California, on December 1, 1937.

In its Decision No. 26297, dated August 28, 1933, the Commission granted a certificate of public convenience and necessity to applicant, authorizing the exercise of the rights and privileges under franchises granted to it by Ordinance No. 151 of the County of Kings and Ordinance No. 290 of the County of Fresno.

Applicant then laid certain gas lines in Kings County and, on July 5, 1934, filed its original Schedules No. 1 and No. 2 covering the service of natural gas for internal combustion engine and agricultural use in Kings County at a flat rate of 16c per M.c.f., and in Fresno County at a rate of 17c per M.c.f., respectively. These two schedules are still in effect and constitute applicant's only

filed rates. Applicant serves some ten consumers, all located in Kings County.

The record shows that in June, 1936, applicant's gas supply at Dudley Ridge, Kings County, gave out and that applicant at that time entered into a contract with Southern California Gas Company for the purpose of its supply of gas; that during the month of October, 1937, its purchases from this source amounted to 2,614,000 cubic feet, while its sales to consumers totaled 422,341 cubic feet, the difference being attributable to line losses; that on November 10, 1937, applicant temporarily ceased rendering the service of gas to its consumers.

Attached to the application as Exhibit "A" is a consolidated operating statement for the period January 1, 1937, to October 31, 1937, which lists income as \$1,153.31, expenses as \$5,029.54, and net operating loss as \$3,876.23.

Applicant introduced evidence which establishes the fact that even with a normal ten per cent line loss the revenue received from sales under its present Schedule No. 1—Gas Engine Service at a rate of 16c per M.c.f. will be inadequate to meet operating expenses and that this rate should be increased to 20c per M.c.f. This increase will be granted.

The tremendous line loss pointed out above is entirely inexcusable and indicates gross inefficiency on the part of applicant in the maintenance of its facilities. This inefficiency has resulted in the rendering of inferior service to its consumers and unduly high operating costs, particularly in the cost of gas purchased. This condition can not be allowed

to continue and must be remedied at once.

Applicant estimates that it will take from sixty to one hundred twenty days to repair these lines and that it will cost approximately two thousand dollars (\$2,000.00).

Applicant alleges that it has negotiated a contract with C. C. Friend for an adequate and permanent supply of natural gas at a price of 5c per M.c.f.

Applicant requests permission to revise and increase the rate for gas engine service in its Schedule No. 1 from 16c to 20c per M.c.f. Several consumers testified that they did not protest this increase provided they were rendered continuous and adequate service.

Applicant requests further permission to file and make effective a Schedule No. 3, covering the service of natural gas for general domestic and commercial use at the following rates:

| | |
|---|---------------|
| First 1,000 cu. ft. or less per meter per month | \$1.00 |
| Over 1,000 cu. ft. per meter per month | at .60/M.c.f. |
| Monthly minimum charge | \$1.00 |

It appears that applicant has been serving a number of consumers under this unfiled schedule in violation of the Public Utilities Act and the rules and regulations of this Commission. The practice of serving consumers under other than filed rates or agreements must cease at once and not be repeated in the future.

Order

It is found as a fact that applicant's present Schedule No. 1—Gas Engine Service is too low

and that same should be increased from 16c to 20c per M.c.f., and

It Is Hereby Ordered that applicant, Gas Fuel Service Company,

1. Proceed at once to repair its lines and facilities, and to put them in good operating condition for the rendering of adequate and continuous gas service to its consumers.

2. Expedite and complete this work and resume gas service to its consumers at the earliest possible date.

3. Render as a progress report, in writing, to the Commission at the end of each thirty (30) day period after the date of this order, outlining the status of the above work until same is completed.

4. File with the Commission at once its suggested amended Schedule No. 1—Gas Engine Service and Schedule No. 3—General Service, attached to the application as Exhibits “C” and “D”, respectively, same to become effective within thirty (30) days after filing.

This order shall be effective immediately.

Dated San Francisco, California, January 3, 1938.

WALLACE L. WARE,
LEON O. WHITSELL,
FRANK R. DEVLIN,
RAY C. WAKEFIELD,
RAY L. RILEY,
Commissioners.

JOINT EXHIBIT No. 7-G

(Copy)

Before the Railroad Commission of the

State of California

Decision No. 35825

Application No. 18672

In the Matter of

The Application of GAS FUEL SERVICE COMPANY, a corporation, for a Certificate of Public Convenience and Necessity authorizing it to construct and operate the gas distribution systems herein described, and to exercise the franchises which it contemplates acquiring from the Counties of Kings and Fresno, California.

By the Commission:

SECOND SUPPLEMENTAL OPINION
AND ORDER

By its preliminary Decision No. 26178 dated July 21, 1933 and confirming supplemental Decision No. 26297 dated August 28, 1933, this Commission granted Gas Fuel Service Company authority to exercise rights and privileges granted it under franchises secured from the counties of Fresno and Kings, to construct and operate gas transmission and distribution systems in specified portions of said counties, and to serve natural gas therein under regularly established rates. The authority so granted was subject, among others, to the following condition:

“The Railroad Commission may hereafter, by appropriate proceedings and orders, revoke or limit

as to territory not then served by Gas Fuel Service Company, or its successors in interest, the authority herein granted.”

In a letter dated June 9, 1942 Gas Fuel Service Company advised the Commission that it was no longer operating and that it had been inactive for the past three years; therefore, good cause appearing,

It Is Ordered that the authority granted Gas Fuel Service Company by Decision No. 26178, and confirmed by Decision No. 26297, be, and hereby is, revoked.

The effective date of this decision shall be the date hereof.

Dated at San Francisco, California, this 6th day of October, 1942.

/s/ JUSTUS F. CRAEMER,
C. C. BAKER,
FRANCK R. HAVENNER,
RICHARD SACHSE,
Commissioners.

Certified As A True Copy

/s/ [Illegible.]

Secretary, Railroad Commission of the State of
California.

ACCOUNT *Central California Steels Corp.*

FORM NO. 153 MONSIEUR LECOULEUR & CO. LOS ANGELES

STANDARD GENERAL LEDGER

| DATE | POSTING REF. | DEBIT | CREDIT | DR CR BAL. | BALANCE |
|---------|--|---------|--------|------------|-------------------|
| Aug 11 | CR #101 - Balance total note | 500000 | | | |
| Sept 1 | CR #105 - Petroleum supply Co. | 500000 | | | |
| " | 100 - G. E. Fire & Ins. Co. | 20770 | | | |
| " | 107 - J. Henderson | 20770 | | | |
| " | 102 - C. S. Mena & Bettelman | 57460 | | | |
| " | 100 - J. Henderson | 57460 | | | |
| " | 111 - C. Bettelman | 100000 | | | |
| " | 112 - Supply & Edg. Oil Co. | 20000 | | | |
| " | 113 - Loan on Note | 200000 | | | |
| " | 114 - Petroleum supply Co. | 1000000 | | | |
| " | 115 - J. Henderson - Legal | 25000 | | | |
| " | 116 - Secy of State - Bureau of Registration | 10000 | | | |
| Oct 8 | Debit Cal. Steel Corp. | 61 | | 415551 | |
| " | " | 61 | | 300000 | |
| " | Gas Fuel Service Co. | 61 | | 1681520 | |
| " | Bettelman & Service Co. | 61 | | 2149533 | |
| Aug 15 | #10 - Cal. Steel Corp. - Selling Exp. | | 17271 | | |
| " | #103 - Walter - Do. | | 127541 | | |
| Sept 6 | #110 - Seaboard Insurance | | 25000 | | 297500 |
| 1937 | | | | | 262500 |
| Feb 15 | #136 | 3500 | | | 237500 |
| Mar 1 | 138 | 3000 | | | 267500 |
| Apr 29 | 145 | 1000 | | | 277500 |
| May 3 | 149 | 1000 | | | 287500 |
| " | 152 | 600 | | | |
| June 15 | 161 | 800 | | | 301500 |
| July 16 | 166 | 750 | | | 299000 |
| " | 167 | 500 | | | 314000 |
| Aug 6 | 169 | 700 | | | 321000 |
| " | 170 | 500 | | | 326000 |
| " | 171 | 800 | | | 334000 |
| Oct 1 | 176 | 800 | | | 342000 |
| Dec 20 | 185 | 500 | | | 347500 |

Forwarded

ACCOUNT

Central Calif Utilities Corp
Notes Receivable

FORM NO. 133 HONORABLE LOOSELEAF CO., LOS ANGELES

STANDARD GENERAL LEDGER

REG. U. S. PAT. OFF.

| DATE | | POSTING REF. | DEBIT | V | CREDIT | V | DR CR BAL. | BALANCE | V |
|-------|-----------------------------|--------------|-------|---|---------|---|------------|---------|---|
| 11/28 | | | | | | | | | |
| m 1 | Bal Forward | | | | | | | 34750 | |
| 74 | Gas & Fuel Service Co # 210 | | 50 | | | | | 34300 | |
| me 3 | Notes Receivable | J 6 | | | 1900 | | | 32400 | |
| 39 | | | | | | | | | |
| 9 40 | | | | | | | | | |
| 24 30 | 3/14 | 5040 | 83434 | | 83419 | | | 3156781 | |
| 42 | | | | | | | | | |
| 46 31 | Chq. off to P+L | J 14 | | | 3156781 | | | 0 | |



[Title of Tax Court and Cause.]

MOTION TO SUBSTITUTE COUNSEL

Comes Now petitioner, and respectfully shows:

That it desires to withdraw Hyman Smith, Esq., as counsel of record herein and substitute Joseph D. Brady, Esq., Walter L. Nossaman, Esq., and Charles M. Walker, Esq. as counsel of record;

That notice of said change of counsel of record has been given to Hyman Smith, Esq., the present counsel of record.

Wherefore, petitioner respectfully requests leave of this Court to withdraw Hyman Smith, Esq., as counsel of record and substitute Joseph D. Brady, Esq., Walter L. Nossaman, Esq. and Charles M. Walker, Esq., of 433 South Spring Street, Los Angeles 13, California, as counsel of record herein.

April 26, 1948. Los Angeles, California.

[Corporate Seal]

CAPITAL SERVICE, INC.

By /s/ M. B. PRICE,

Vice-President.

Petitioner.

I agree to the within substitution.

/s/ HYMAN SMITH.

April 26, 1948.

Granted: May 5, 1948.

/s/ WILLIAM W. ARNOLD,

Judge.

Filed April 26, 1948. T.C.U.S.

[Title of Tax Court and Cause.]

ENTRY OF APPEARANCE

The undersigned, being duly admitted to practice before The Tax Court of the United States as Attorney ~~C. P. A.~~, * * * herewith enters his appearance for the petitioner in the above-entitled proceeding.

/s/ CHARLES M. WALKER,
433 S. Spring St.,
Los Angeles 13.

* * * Cross out qualification class not applicable.
Filed May 5, 1948. T.C.U.S.

[Title of Tax Court and Cause.]

ENTRY OF APPEARANCE

The undersigned, being duly admitted to practice before The Tax Court of the United States as Attorney ~~C. P. A.~~ * * * herewith enters his appearance for the petitioner in the above-entitled proceeding.

/s/ JAMES L. WOOD,
433 S. Spring St.,
Los Angeles 13.

* * * Cross out qualification class not applicable.
Filed May 5, 1948. T.C.U.S.

Minutes of Proceedings

The Tax Court of the United States

May 5, 6, and 11, 1948.

Los Angeles, Calif.

Docket No. 13562.

[Title of Cause.]

Assigned to: Judge W. W. Arnold, Division No. 12.

On the merits yes.

On motion of petitioner's counsel to substitute counsel granted.

Motion of petitioner's counsel to file amended petition. No obj. by resp. Granted.

Motion of respondent to file amended answer thereto. Granted.

Ordered: Permission to conform duplicate stipulation.

Leave granted to Counsel for resp. to withdraw exhibits and substitute photostatic copies.

By agreement of counsel the income tax returns of Gas Fuel Service Co. from 1936 to 1940 will be supplied and marked Ex. EE to II, inclusive.

Filed at hearing: Amended petition. Amended answer. Stipulation of Facts.

Petitioner's brief: Concurrent June 21st. Reply July 21st.

Respondent's brief: Concurrent June 21st. Reply July 21st.

THE TAX COURT OF THE UNITED STATES

Docket No. 13562

CAPITAL SERVICE, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Before: Honorable William W. Arnold,

Judge.

APPEARANCES

CHARLES F. WALKER, and

JAMES L. WOOD,

361 Title Insurance Building,

Los Angeles, California,

appearing for the Petitioner.

R. E. MAIDEN, JR.,

HONORABLE CHARLES OLIPHANT,

Chief Counsel, Bureau of Internal Revenue,

appearing for the Respondent. [1*]

PROCEEDINGS

The Court: Call the next.

The Clerk: Capital Service, Inc., Docket 13562.

Mr. Walker: Ready for Petitioner, your Honor.

Mr. Maiden: Ready for the Respondent. R. E. Maiden, Jr., for Respondent.

Mr. Walker: Charles M. Walter for Petitioner.

The Court: Very well, gentlemen, you may tell me what the issues are in your case, and what you expect to cover by your testimony.

Mr. Walker: If the Court please, Petitioner

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

would like to offer at this time, motion for leave to file an amended Petition, and to submit an amended Petition for filing. This matter has been discussed with counsel for Respondent and it is agreeable to him. The purpose of the amended pleading, your Honor, is not to raise any additional issues which would need elaboration at the hearing, just simply to line up the necessary allegations in view of the complicated provisions of the loss carry-over and consolidated return provisions. All of the issues of our case remain exactly the same.

Mr. Maiden: That is true, your Honor, and the Respondent has no objection to the Court's receiving the amended Petition, and the Respondent has prepared his amended Answer, having been served with a copy, but I forgot it this morning, but one of the girls will bring it here during the course of the day [3] and I will file my Answer to the amended Petition some time around noon.

The Court: Very well. Amended Petition filed.

Mr. Walker: I believe also, your Honor, that I would like to call the Court's attention to the fact that there was a motion filed at the calendar call of this case for substitution of counsel for the Petitioner. I am not certain that that motion has been called to the attention of the Court, but it has been made and counsel has made no objection thereto.

The Court: Motion to substitute counsel has been granted.

Opening Statement on Behalf of the Petitioner

By Mr. Walker

Mr. Walker: If the Court please, the parties

have entered into a stipulation of facts covering a good many of the facts in this case. Many of the facts stated in the stipulation appear to be rather technical details regarding the net operating loss carryover provisions in connection with consolidated returns.

We have been quite precise, we believe, in setting forth only such facts as can be agreed to, and which will lead the Court to a proper determination of the issue on the technical ground of that nature.

The essence of our case is the one of worthlessness in [4] 1942 of an indebtedness owed to Petitioner by a corporation known as Central California Utilities Corporation. The question of whether or not the indebtedness and some \$1,300.00 of stock of the debtor corporation owned by the Petitioner became worthless in 1942 is significant in this 1943 case, because of the net operating loss carryover provisions. So that having stipulated as we have, the Court has to consider only the question of whether or not this indebtedness and the stock had become worthless in 1942, or whether it did not.

The basis upon which worthlessness is claimed is that the Central California Utilities Corporation, the debtor, was a corporation which was conducting a gas distributing service in Kings and Fresno Counties, California. At the time the indebtedness was incurred, in 1936, the gas distributing business in Kings County and Fresno County was not a very healthy business, and it was known to be unhealthy by Petitioner when the money was advanced. The money was nevertheless advanced, because it looked

like a potentially good prospect, and the money was put at the risk of a venture in the hope of reaping a rather handsome gain from it.

Subsequent to the advance of the money in 1936, conditions changed somewhat in that area, and additional money would be necessary to put the project on its feet. Petitioner had no money to do it, but it hoped to secure it, and if it could not it would be able to find another source of supplying [5] money for it, in which case Petitioner's position in this company would be able to be recovered and be recouped, and until the war conditions of 1942 came about that was the aspiration and hope and very real expectation of the Petitioner. But due to the war conditions of 1942, it was necessary to abandon such hope and having done so, to abandon the only asset which petitioner claims to have existed through 1941 until 1942, namely, a certificate of convenience and necessity granted to the debtor corporation or one of its subsidiaries for the distribution of gas in Kings and Fresno Counties.

That, if the Court please, is the essence of our case, and the witnesses which we will call will bring the matters out in more detail.

Opening Statement on Behalf of the Respondent

By Mr. Maiden

Mr. Maiden: If the Court please, Mr. Walker has properly stated the issues drawn between the parties, and he has given, of course, his view of what the facts are. I do not necessarily agree with the interpretation he has placed upon the facts, but I do not consider it necessary for me to make a

statement with regard to what the Respondent considers to be the facts as they will be developed here in the record.

The Court: Very well.

Mr. Walker: If the Court please, I would like to submit the stipulation of facts that the parties have entered into. There are some very minor changes which counsel and I have indicated in ink this morning on the original, and the duplicate copy which will be filed, has not as yet been conformed to this, but it can be in very short order, and I would like the record to show that the stipulation has been offered at this time.

The Court: The original stipulation of facts filed will be received as evidence in the case. Permission given to conform duplicate stipulation to the original stipulation as now filed. Is that satisfactory?

Mr. Walker: Fine.

The Court: Call your first.

Whereupon,

RALPH W. MOORE

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Ralph W. Moore.

Direct Examination

By Mr. Walker:

Q. Mr. Moore, what is your business or profession?

(Testimony of Ralph W. Moore.)

A. Well, I have been a business manager and organizer of various concerns, go into a company that needed refinancing [7] or new management and try to see if I couldn't work that out and put them on a profitable operating basis.

Q. How long have you been so engaged?

A. About, from approximately 1930.

Q. 1930? A. Around 1930.

Q. You have made a business of being a business manager in connection with getting organizations on their feet. I wonder if you could elaborate a little bit more, please, take one specific case for example, in which you engaged in such activities.

A. Well, the reorganization of the Inland Public Service Company was one..

Q. Can you state another, prior for example, to Inland?

A. Yes, the Edding Winthrop Refining Company at Long Beach.

Q. Generally speaking, what activities did you perform in connection with that Long Beach project?

A. Well, we first made a survey of it for the Bank of America to see just what condition it was in and what the possibilities were of trying to work it out. After filing a report, they seemed to feel that it could be revamped and it was. We, by the repairs of the company, paid the bank practically all its money. [8]

Q. How long a time did that project consume?

(Testimony of Ralph W. Moore.)

A. I would say approximately two years, a year and a half or two years.

Q. You mentioned also that you had done similar work for the Inland Public Service Company?

A. Yes.

Q. When did you first become interested in the Inland Public Service Company?

A. It was in the latter part of 1935.

Q. Did you contact a man named Dundas in connection with that project? A. Yes.

Q. Who was he?

A. Mr. Dundas was an attorney and one of the original promoters of the Inland Public Service Company, a man whom I had known in Portland during the last war.

Q. And who brought this Inland project to your attention?

A. Well, I would say that it came up in the course of a conversation.

Q. Why was it that he brought it to your attention?

A. Well, he seemed to feel that I had some financial connections and some experience in the management of different kinds of business, and he felt that if someone would take hold of it that could straighten it out, and procure some additional [9] working capital, that it was a very splendid proposition.

Q. Did you become interested in seeing what you could do with it?

(Testimony of Ralph W. Moore.)

A. Yes, I first went and looked over the property and saw what it was, talked with many of the ranchers up in that section, and I decided that if it could be reorganized and put on its feet it was a very splendid and could be a very profitable operation.

Q. What led you to believe that it did have such possibilities?

A. Well, they had one small gas lead and they had an opportunity of securing others. The gas was shallow gas, at about 1200 feet, and they had a franchise from the State Railroad Commission permitting them to sell gas at 16 cents in Kings County and 18 cents in Fresno County.

Q. Right at that point, Mr. Moore, I would like to call your attention to the necessity of being careful about future terminology with reference to this franchise from the State of California, did you say?

A. Well, from the Railroad Commission. I presume that is the State of California.

Q. I believe that is correctly referred to as a certificate of public convenience and necessity.

A. That is right.

Q. As distinguished from a franchise. We also have [10] franchises, in the picture, your Honor, and I prefer not to confuse them. You say, then, that there was a certificate of convenience and necessity to serve Kings and Fresno Counties?

A. Yes, all of Kings and Fresno Counties except the incorporated cities. That was the terms of the franchise.

(Testimony of Ralph W. Moore.)

Q. You say you became interested in it. What was there in it for you?

A. Well, naturally, I expected to have a substantial portion of the profits, if any, that were derived from the reorganization of it.

Q. Then you expected to become a stockholder in the reorganized company? A. Yes.

Q. You say that it was necessary, for your interest in that project to become effective, that it was necessary to arrange for some money. What did you do in arranging for that money?

A. I took the matter up with Brashears & Company, explained the proposition to them, showed them what the profit possibilities were, and succeeded in getting them to put up an additional \$20,000.00 to see if we could put the company back on its feet.

Q. How did you happen to get in touch with Brashears & Company?

A. I had known Martin Lathrop for many years. Lathrop [11] at that time was connected with Brashears & Company and I talked to him about that, and then through that, through Mr. Morgan in Mr. Brashears office and then Mr. Brashears.

Q. And you knew the type of business that Lathrop and Brashears were in?

A. Yes, sir. I knew they were a firm, G. Brashears & Company were in the business of selling securities, yes.

Q. You thought that you could arrange to obtain some money for them for the project?

(Testimony of Ralph W. Moore.)

A. Yes, that was my purpose in going to them.

Q. What sort of a deal did you make with them?

A. Well, finally we made a deal that of the promotion stock they were to receive 75 per cent for doing the financing and I was to receive 25 per cent for my services.

Q. Can you tell us just a little bit about what this reorganization looked like? You say the old Inland Public Service Company was in the area of Kings and Fresno Counties, and you were going to go ahead and reorganize it so that the promotional shares of the new company would be owned 25 per cent by you and 75 per cent by the Brashears interest?

A. Yes, that is correct.

Q. Could you say where the source was of the promotional shares that you and Brashears were to buy?

A. Well, the setup of the Inland Public Service Company was a holding corporation that owned all of the capital stock [12] of the Gas Fuel Service Company and the Kettleman-Lakeview Oil and Gas Company.

Q. Just a moment for the reporter to get those names, the Gas Fuel Service Company and——

A. Yes.

Q. And the Kettleman-Lakeview Oil and Gas Company, Ltd.

A. I don't recall whether they were Limited.

Q. Well, the Kettleman-Lakeview Oil and Gas Company?

A. Yes.

Q. You say that the Inland Public Service Com-

(Testimony of Ralph W. Moore.)

pany was the holding company for the Gas Fuel Service and the Kettleman Company?

A. That is right. The Kettleman-Lakeview Oil and Gas Company was the operating company to produce the gas and the Gas Fuel Service Company was the company to distribute it and which had the certificate of public convenience and necessity. The Inland Public Service Company was the only one that had any stock in the hands of the public, and it was the owner of the entire stock issue of both the Kettleman-Lakeview Oil and Gas Company and the Gas Fuel Service Company.

Q. In the reorganization of the Inland Company, what interest did the old Inland stockholders get out of the reorganized company?

A. Well, the Central California Utilities Corporation, which was organized to take over the Inland Public Service [13] Company, was authorized to issue 500,000 shares of stock, of which 250,000 were promotional shares, and 117,000 shares were exchanged for the then outstanding stock of the Inland Public Service Company on the basis of one share of Central California Utilities for three shares of the Inland Public Service.

Q. And there had been promotional shares, had there, in the old Inland Public Service Company?

A. Well, I would say yes. I was not thoroughly familiar with the entire setup, but there were.

Q. How much cash——

A. Yes, I recall now there were some.

(Testimony of Ralph W. Moore.)

Q. How much cash was necessary to make this reorganization? By that I mean in obtaining the promotional shares for yourself and also the ones that went to the Brashears interest, was it necessary to spend cash to do so?

A. You mean spend money to get the——

Q. To get the shares? A. Yes.

Q. Now——

A. No, we didn't spend any; the only money we spent was we bought a few shares from one of the original promoters named Savage, but there was no money spent for the purpose of obtaining the——

Q. In other words, you and Brashears came into the control [14] of this utilities project for practically nothing, with the hope of putting this money forward which it needed right at that time?

A. Yes.

Mr. Maiden: Just a moment. That is just a leading question. I object and ask that the witness' answer be stricken.

Mr. Walker: All right, I will work it out in a slightly different way.

The Court: The question was leading and the answer of the witness will be stricken.

By Mr. Walker:

Q. You have stated that no money was spent for the promotional shares?

A. Do you mean at the original, at the start of the project?

Q. That is right.

(Testimony of Ralph W. Moore.)

A. No, there was no money spent for it.

Q. What percentage of the total outstanding shares of the Central California Utilities was owned by you and Brashears?

A. Well, we had 250,000 shares, and there was, after the exchange, there was 117,000 in the hands of the public at that time.

Q. I see. And each of the shares had equal voting [15] rights?

A. It was all one class, all common stock.

Q. When you interested Brashears Company in this project, I think you have stated that the Brashears interests were to have 75 per cent of the promotional shares. Did you know what part in the picture the Capital Service Company was going to play?

A. Not at that time, no.

Q. Did it make any difference to you what part it did play?

A. No, it didn't make any difference to me, as long as the money was available.

Q. You were after the money, then?

A. That is right.

Q. How much money did you say was arranged for?

A. The initial amount was \$20,000.00.

Q. And \$20,000.00 was to be supplied by the Brashears interests?

A. That is right.

Q. For what purpose?

A. Well, the old Inland Public Service Company owed about, I think roughly about \$4,000.00 worth of bills up in that country, labor bills, supplies,

(Testimony of Ralph W. Moore.)

and one thing and another. There were two wells on the lease that at one time had produced a very large—both had produced very large quantities of gas. [16] We expected to drill those out, they had a cement plug in them, and get a supply of gas from that source, extend the pipe lines in the immediate territory, and we felt that that much money would be sufficient according to the best information we had.

Q. All right. Then with the \$20,000.00 what are the things that you said it was planned to do with that? Were there any other terms of the deal?

A. Well, the terms were—the terms of Brashear was that if the \$20,000.00 proved the project to be successful in that small local area, that he would then sell the remaining 183,000 shares to the public.

Q. Now, you have referred just now to some 183,000 shares. That is on top of the 250,000 promotional?

A. Yes. I thought I made that plain. There was a total issue authorized of 500,000 of which 250,000 was purely promotional stock. There were 117,000 shares in the hands of the public, which had been exchanged on the basis of one share of Central California for three shares of the old Inland Public Service, and then that left 183,000 shares in the Treasury of the Company, which would be available for sale.

Q. And it was intended to sell those if the expenditure of the \$20,000.00 made the project look good?

A. Yes, that was the plan.

(Testimony of Ralph W. Moore.)

Q. Now, in presenting this project to Mr. Bra-shears, did [17] you tell him anything with reference to what you thought the value of the project was?

A. Yes, I interviewed, I would say about 15 or 16 of the big gas customers up there, and I made a statement showing what the revenue would be, what the expenses—what the expenses would be, and what the resulting profit would be up to that point, at that time.

Q. Did you state anything to him other than submitting such figures as to what you thought the project would come to?

A. Oh, yes, I was very optimistic. I thought selling gas at 16 cents a thousand, which cost only about a cent and a quarter would produce a fair margin of profit and there was practically an unlimited market for it, for selling it in competition with electricity and some gas in that territory.

Q. You said you had made investigations of the project?

A. Of that portion of it that we were then considering rehabilitating, yes.

Q. Can you tell me a little more about what that investigation covered?

A. Well, that covered talking with the various farmers, ranchers, and some of the industries. For instance, there is a large milk drying plant just outside the city of Lemoore. They were buying gas from the Southern California Gas Company, I believe it was, and they were paying approximately

(Testimony of Ralph W. Moore.)

thirty cents for it. Our price was 16 cents. There was another large [18] outfit down at the little town of Corcoran, which is, I believe the J. D. Boswell Company. We talked to Mr. Boswell and with his engineers and they furnished us the bills that they had paid for electricity for pumping, and in that season, that was the season of 1935, as I recollect, the figures on the power bills were some \$32,000.00.

Q. What did that lead you to believe?

A. Then we took it around and converted that horse power back into gas at 16 cents and it would cost them roughly about \$7,500.00. I did that to feel out the market, to see what the prospects were for the sales of large quantities of gas.

Q. And did the user of the electricity see the figures that you presented or did you check them over with him, comparing the cost of gas and the electricity cost?

A. He did the figuring. His engineer did the figuring right there in Corcoran.

Q. I see.

A. I didn't know how to convert gas back to horse power in electricity, but he did.

Q. Did he express any thoughts about whether he preferred gas or electricity?

A. Oh, yes indeed, he was decidedly in favor of gas. We couldn't go into the City of Corcoran itself, but we could go up to the line and their propo-

(Testimony of Ralph W. Moore.)

sition was they were to build [19] a line out to where they took our gas.

Q. Were there any farmers out there that you contacted?

A. Yes, I think there were, if I remember correctly, there were about 12 customers on the old line that had previously been reached by the Inland Public Service Company.

Q. What would those farmers want with gas?

A. They wanted to pump water for irrigation.

Q. Then your investigation had led you into these inquiries. What did you conclude from it?

A. Well, I concluded from that if I could get 25 per cent of the company I would have a very decidedly fine proposition.

Q. You believed you would get a gas supply?

A. That we would get a gas supply.

Q. And what did you expect to do about obtaining a gas supply?

A. Well, the old Inland Public Service Company had one lease of 60 acres upon which there had been a producing gas well.

Q. Was it producing at the time?

A. No, not at the time we came into the picture. That was what wrecked the Inland Public Service Company. That well blew out.

Q. All right. Then what did you do to line up a gas supply? [20]

A. Then we secured a lease from Friend Anderson on about 750 acres of land on which there were

(Testimony of Ralph W. Moore.)

two wells that had produced very large quantities of gas over a substantial period and which had been sold to the Pacific Gas and Electric Company.

Q. Were they producing at the time?

A. No, they were not producing at the time. The Pacific Gas and Electric Company had taken out all their pipe, they laid a pipe up to those wells, connecting to their main line, and they had taken that out and they were not taking any gas from anybody in that territory.

Q. What was the status of those wells that you described?

A. Well, they had a cement plug in the bottom of each one of them turning off the gas so it couldn't come out.

Q. What did you hope to do about obtaining your own gas supply with reference to those wells?

A. Well, we hoped very much to just drill that cement plug out and put the wells back in production.

Q. Was there anything else that you thought of in lining up a gas supply?

A. Why yes, there were a number of different things, the Irma Investment Company had a well just off of our lease. It was capped, it was not plugged and they had been selling to the P.G. & E., so we knew that we could buy that well away [21] from them on the basis of paying for the gas as we took it out.

Q. Did the Inland Public Service Company at

(Testimony of Ralph W. Moore.)

the time you became interested in the project have a deal with the Irma?

A. They had had a lot of conversation, but it was in bankruptcy and they never had gotten to the point of making a definite deal with the referee.

Q. You refer to bankruptcy. Was it the Irma Company that was in bankruptcy?

A. I don't remember whether this—I think it was the Irma Investment Corporation.

Q. I mean it was not the Inland Company?

A. Oh, no, it was the Irma.

Q. Did you do anything else to try to line up a gas supply? A. You mean at that——

Q. At that particular time, yes.

A. Well, we drilled out our own well.

Q. I mean before you began operating yourself, in canvassing the field, you have stated now, that you talked with the customers or potential customers to sound out the market; then you stated that it was necessary to line up a gas supply. This is all your preliminary investigation now?

A. That is right. [22]

Q. Was there anything else done in the preliminary investigation with reference to seeing what gas supply might be available?

A. Nothing except to get the 750 acre lease from Friend Anderson.

Q. At the time you became interested in this project and made your investigation, was the Inland Public Service Company in operation?

(Testimony of Ralph W. Moore.)

A. No, not at that time. It had been until this well blew out. These were not potential customers. They were actual customers of Inland Public Service.

Q. Which customers were those?

A. These 12 or 15 that I interviewed.

Q. The farmers?

A. Yes, and ranchers there.

Q. Among these other—but these other large consumers potentially had not been served?

A. No, they had not been served.

Q. And because they expressed a desire for gas, what was your conclusion with respect to the size of the project you could develop?

A. Well, after making a preliminary investigation and getting money from Brashears, I went up all through Fresno County and all through that section and from all the conversations I had with the heads of the various farmers' organizations [23] and big users, the different big users, I could see where the gas company could sell around twenty-five to thirty million feet of gas a day for about seven months out of the year.

Q. And what did that mean in the way of dollars of income?

A. Well let's see. At 18 cents, it would be roughly \$5400.00 a day, wouldn't it? I can't multiply it in my head.

Mr. Maiden: Don't look at me Mr. Moore, because I can't figure.

(Testimony of Ralph W. Moore.)

By Mr. Walker:

Q. Do you recall having reached any tentative conclusion at the time of what this project might yield on an annual basis?

A. Are you talking now, Mr. Walker of the period when we were putting the \$20,000 into the project?

Q. No, I was talking about the preliminary investigation you made that would lead you to believe this was a good project?

A. After this first \$20,000.00 was spent, or at the time it was being spent, then I saw what I thought was the tremendous possibilities of profit, and I immediately started a lot of negotiations. We had a tremendous territory there from Tulare Lake away over here to the northern end of Fresno [24] County, and we were entirely surrounded by gas all through, the Superior Oil Company had a lot of gas wells that were shut in, the Fullerton Oil Company had gas wells that were shut in, the Pure Oil Company had a lot that were shut in, and had drilled four gas wells and they were shut in.

Q. And those were sources of gas that you were able to use?

A. That is right. At that time the Pacific Gas and Electric would not buy any gas from any of them.

Q. Did you have any hope of making the project succeed on the basis of its size when you went into it?

A. Well, yes, on that basis, that we went into it.

(Testimony of Ralph W. Moore.)

If we could have had another, oh roughly, 12 miles of pipe line, we could have reached this dried milk factory that was just outside of Lemoore.

Q. Was that the purpose of putting up this money to start with or was it for some other purpose?

A. No, the purpose of putting up the money to start with, was to get some gas out in the lines out of which these people had already been buying gas that were actual customers and had bought gas for quite some time.

Q. Yes.

A. And we had hoped to meet—to reach that Dried Milk—that was the only large customer outside of the ranchers that we had in mind when the \$20,000.00 was put up. [25]

Q. Then when you paid that money out, it was not in fact a going concern, as a loan on a term basis?

A. No, it was a pure speculation, pure gamble. There wasn't any——

Q. You have spoken at some length of the potentially productive wells in the Friend Anderson lease and on one or two other properties. At the time that you became interested in the project what was done to bring a gas supply in from those wells?

A. We drilled the cement block out of the first well and it came in wet.

Q. What does that mean?

A. Well, it means that the water had impreg-

(Testimony of Ralph W. Moore.)

nated the gas carrying structure there so that while we got plenty of gas we also got plenty of water.

Q. Could you use such a product? A. No.

Q. You couldn't put it into your line?

A. No.

Q. Did the well do you any good then?

A. No.

Q. That work that was done on that well that came in wet, let's just keep straight on what well we are talking about now. That was the well you say that had been plugged and was not in production when you became interested in the [26] project?

A. That is right.

Q. And after you became interested in the project, then work was done to drill this plug out?

A. That is right.

Q. So that you did produce a well with this \$20,000.00. A. Yes.

Q. When was the drilling done on that well, do you recall, generally?

A. My recollection of it, it was the early part of 1936, the latter part of 1935, or early in 1936.

Q. And you say it developed a water supply and consequently it was absolutely no good?

A. That is right.

Q. Were you able to bring in, with the expenditure of that \$20,000.00, any gas production at all?

A. No.

Q. Were any attempts made to bring in any supply of gas after this one well had been drilled and came in wet?

(Testimony of Ralph W. Moore.)

A. Yes, we drilled a new well.

Q. When was that?

A. That would be within a few weeks after the first one came in wet.

Q. Were you still using some of this \$20,000.00?

A. Yes, up to that time. [27]

Q. Did you have any of this money in the corporation, in fact, after 1936?

A. Well, my impression was it was the latter part of 1936 or 1937, in there. I am not definite about it.

Q. You have referred in your previous testimony to a well named the Irma. Can you tell us a little more about that, what it was and where it was?

A. Well, originally the firm of Wishon & Watson in Fresno, they are big operators up in that section, took this lease, I believed they owned 640 acres of this land. The Irma Investment Company was incorporated and took up the lease and Wishon & Watson then drilled the Irma No. 1, and Irma No. 2. There is a little confusion about the names. In some places, they are recorded as the Watson No. 1 and Watson No. 2.

Q. Was the No. 2 well in production?

A. Yes, they both produced.

Q. Were either of them in production when you became interested in the project?

A. No, neither one of them were. The No. 2 had had some sort of a minor cave-in, and I believe

(Testimony of Ralph W. Moore.)

that had been cemented off. The No. 1 was simply capped. It was not cemented.

Q. Could they have been brought back into production at any time, the No. 1?

A. Oh, yes, yes. [28]

Q. And did the Central California Utilities Corporation or any of its subsidiaries ever make use of the gas from Irma No. 1?

A. Yes, we made a purchase contract with the receiver to buy both wells for, I believe, \$25,000.00.

Q. That was in fact a well that was on your own property?

A. It was not on our property, no.

Q. How long did that Irma No. 1 supply gas for your use?

A. Well, it supplied it until it was wrecked, I think in 1937.

Q. It was wrecked. It was wrecked, you say. What wrecked it?

A. Well, the Shell Oil Company were making geophysical survey graphs of the whole territory and in putting down one of their shots, it evidently caved in the Irma No. 1 well, and it didn't produce any gas after that.

Q. That was some time in 1937, you say?

A. Yes, that is my recollection of it.

Q. What was done during 1937, if anything, to locate a gas supply?

A. Well, we—there was a Mrs. Irvine had taken a lease down below one of our leases and was drilling a well there. I talked with her on several occasions. [29]

(Testimony of Ralph W. Moore.)

Q. Did you borrow any money from Capital Service in 1937 to help you locate productive properties?

A. Yes, I believe it was—we borrowed, I believe it was \$14,000.00 just about that time.

Q. On top of the \$20,000.00?

A. On top of the twenty, yes.

Q. And no success came from your negotiations with Mrs. Irvine?

A. No. She had the same results that we had. She struck water instead of gas, or gas and water.

Q. Where was that, on your property?

A. No, that was the first well she drilled, was just off our property. In addition to this 750 acres of Friend Anderson, we had put some money up for 1500 acres from the Dudley Ridge.

Q. Did you do anything further to develop gas from the Dudley Ridge Company?

A. Yes, we discussed with them and Mrs. Irvine. We made her a proposition that we would give her the 1500 acres, and also that we would pay for the gas at five cents a thousand feet if she succeeded in producing a well, this well she was drilling was just off this land of ours and it came in wet, so she gave that idea up. Then I talked to a Mr. Nelson, who was in the oil business here, that we would sublet our lease on the Dudley Ridge Oil Company on condition that he pay no rent the [30] first year and drilled some wells, but our arrangement with

(Testimony of Ralph W. Moore.)

him was the same way that, that he was to have all the acreage that would exceed 250 acres and we would buy the gas from him for five cents a thousand.

Q. Did Nelson bring in any wells?

A. No, he didn't.

Q. How long a period of time did those attempts cover with Nelson and with Irvine?

A. Well, I think Nelson and Irvine and the Dudley Oil Company, we haven't brought that in yet, but they were in the picture. Those negotiations continued away through—I think through until 1941.

Q. Did any of the negotiations you had with the Nelson interests or Mrs. Irvine cost any money?

A. No.

Q. What induced them to drill?

A. Well, they would equally benefit if they drilled gas at 1200 feet and sold the gas for five cents a thousand, that is a fairly profitable operation.

Q. And they were willing to put up the money to drill on your leases and try to get a well for you because they would benefit?

A. Yes. Then of course at that time there was a great oil field going up through that whole territory and Shell spent thousands and thousands of dollars on geophysical surveys, [31] and there were wells being drilled all through that entire territory.

Q. Well, apparently numerous attempts had been

(Testimony of Ralph W. Moore.)

made to bring in wells on your leased property and none had come in. Did you think——

A. May I interrupt just a moment? That isn't quite correct. To understand the situation clearly, the first well that was drilled was drilled on the 60 acres of land that we had from Friend Anderson. That well came in, a very beautiful well, about 12,-000,000 cubic feet of gas a day, and when it blew out, and the Standard Oil and the other big gas operators that were interested in the Kettleman Hills all came down and attempted to shut it off, and they estimated that it was roaring at the rate of 40,000,000 feet of gas a day.

Q. When did this blow take place?

A. That took place before we went into it. I think it was the very early part of 1935. That was the basis on which we were interested in that entire field. That merely showed there was plenty there that we could get if we drilled the concrete out of the Pacific Gas. The records showed that they had taken more than 2,000,000 feet of gas a day out of that well. Assuming that on the other side we would have the same record, we found that it looked like a very interesting possibility, not only for gas output but for oil.

Q. But as a matter of fact, no wells were brought in on [32] your properties?

A. Not on our properties.

Q. Well, did you ever give up hope of bringing in one on your properties?

(Testimony of Ralph W. Moore.)

A. Well, along the latter—when the Pure Oil came into the picture we changed our—at least I changed my thoughts a little, because their development had started up at the upper end of the field of our franchise or of our certificate and came down.

Q. When did your negotiations with Pure Oil take place?

A. My recollection is sometime in 1938 or '39.

Q. And you say that they were developing north of it?

A. Yes, they were in Fresno County, in a little section called Chowchilla.

Q. Was Fresno County one of the counties covered by your certificate? A. Yes.

Q. Now, tell me a little bit more about why you were negotiating with Pure Oil?

A. Well, as I understood the story at that time, the Pure Oil was figuring on coming out here in the western territory and going into business and opening up the sale of gas and gasoline, and they drilled, I believe four wells in the lease that they had there. They were naturally looking for [33] oil, but they struck a very large supply of gas, no oil. They drilled in other sections, too, but this was the one that I was particularly interested in.

Q. Well, what was the basis of your negotiation with them?

A. Well, the idea of our negotiation with them was that I went over the whole story with them as I have given here, showing the predicted and in-

(Testimony of Ralph W. Moore.)

tended location of our lines, and the available amount of gas there, with Mr. Clark, who was western manager, went over the territory and looked the situation over and——

Q. In other words, you presented a possible outlet to them, to buy their gas from them?

A. Well, the basis of the deal was that we had to put in all the lines and they had probably 35 or 40,000,000 feet of gas available per day out of the well that they had already drilled, and our thought was at that time that we wanted all that gas, and they had gas and we wanted money.

Q. Then how did that state of negotiations compare with your original plans, at the time when you went into the project in 1936?

A. Well, of course, the thing on that basis had reached a size that was away beyond anything we had contemplated with \$20,000.00. That was one of the features that I had in mind when we first started, and we were trying to bring it about at [34] that time.

Q. Did you sound out the potential market for gas in Fresno County? A. Yes.

Q. How did that compare with the market in Kings County?

A. Oh, it was probably 20 times as great.

Q. And was that the basis of your statement that you expected to be losing money in the pipe line or extend a line that would cost a lot of money?

A. Well, Mr. Clark made some investigation

(Testimony of Ralph W. Moore.)

up there himself, and I went up there all through Fresno County and talked to very many, I would say about 35 or 40 of the other land owners, and we also contacted one of them in San Francisco who farmed about 6500 acres. We went all through that section and made a survey of what the possibility of gas would be.

Q. Then you have, yourself, no leases up in Fresno County? A. No.

Q. What happened to the leases that you had in Kings County?

A. Well, we gave one to Nelson to try to get him to drill, and then we quitclaimed the others back to the land owners.

Q. Why was that?

A. Well, they had a monthly rental provision in them [35] and that had been paid for a long while, and that took up quite a lot of money in rent, and others had drilled in our immediate vicinity, and the drilling in front of our leases were not successful in producing oil.

Q. When did this quitclaiming take place?

A. Well, frankly I—

Q. Do you recall generally with reference to your drilling activities or your negotiations with Irvine and Nelson?

A. It was after that time.

Q. Would you say that was 1937 or 1938?

A. I would think it would be in the latter part of 1938 or 1939, in there.

(Testimony of Ralph W. Moore.)

Q. Did you feel that the quitclaiming of those leases had any particular effect on this project?

A. No, I didn't feel so at that time because there had been about five different attempts to develop gas from that 1200 foot level and no one was successful. Apparently when the Friend No. 1 well blew out and after we got the first one, that evidently let water into the gas carrying structure of the whole field.

Q. Then, after you had quitclaimed your leases in Kings County, what did you expect would be the way the project could continue?

A. Well, at that time there was plenty of gas available. The Superior Oil Company had a number of wells shut off [36] down below us and Fullerton Oil Company had gas wells shut off below us.

Q. You mentioned something about Pure Oil.

A. No, that was another, Pure Oil was up north. These were down below Kings County, in the edge of Kern County, and I gathered in the negotiations with the Superior Oil and with the Fullerton Oil, those companies were ready to sell us gas if we had some money to lay some pipe line.

Q. Were you able to make any arrangements for a gas supply with those people?

A. No, the only thing we did, we permitted them to get them a market to sell their gas to the Southern California Gas Company.

Q. Not having made a successful negotiation with them, what effect did that have on your proj-

(Testimony of Ralph W. Moore.)

ect as a whole, which covered most of Fresno and Kings Counties?

A. Well, it had—as far as the local situation went, the Kings County end of it, it was a bit discouraging. As far as the general proposition went, I didn't feel that it had any particular ill effects on it.

Q. What do you mean by the general proposition?

A. Well, in general, the general proposition of Fresno County and Kings County, because we could connect with other oil companies.

Q. Why did you feel that as a general proposition it [37] did not particularly matter?

A. Well, I felt that at that time we could get a very large supply of gas from other people and they had plenty of money then, they were very frank in saying they were in opposition to the Southern California Gas Company, inasmuch as the Southern California Gas Company only wanted to give them too low a price, and Superior Oil Company was the same way, so I felt that there was opportunities of getting gas.

Q. And the thing you expected to do with the gas has been explained, what you wanted to do with the gas after you got the money.

A. Well, we wanted to sell that to the farmers particularly in the area, and we wanted to sell it to the dairy people, the Dried Milk Company, the people have got a condensery down there, con-

(Testimony of Ralph W. Moore.)

densery, is that what you call it? As I stated before, they were paying approximately \$32,000.00 for electricity and it would be about \$7,000.00 for gas. Then we had a few customers lined up that were taking other gas in.

Q. You were certain then as to the potential market? A. Oh, yes.

Q. And you did consult the market, and did you negotiate with any others about the market?

A. Yes, there were very serious negotiations conducted with the City of Fresno.

Mr. Maiden: Have him put dates on these things, Mr. Walker.

Mr. Walker: All right. That was going to be my last question.

Mr. Maiden: Well, I'm sorry.

By Mr. Walker:

Q. So to tie in now the conditions that existed after you had quitclaimed your leases, that you have stated was perhaps some time in 1939—well, let me withdraw that question and phrase it in a little different way. Could you compare the picture of this project, generally speaking in 1939, with 1936, insofar as what you thought the project was and could be worked into?

A. Well, in my opinion it was very much better in 1939 than it was in 1936, despite the ill fortune we had had.

Q. Why was that?

A. Well, because in 1936, I didn't have the faint-

(Testimony of Ralph W. Moore.)

est idea that you could sell the immense quantities of gas that you could. I conducted negotiations with the—I believe it was the mayor of Visalia, and the mayor of one of the other towns up there. They had organized under the public utility laws of California, a local district, and they were all willing to buy gas.

Q. This was in 1939?

A. Well, very frankly, Mr. Walker, I am sorry, the date on these, I can't remember the date. They—these evolved [39] in years. Remember the negotiations that we were engaged in, but naturally I can't—

Q. All I wanted you to state for the record now, is what you thought the project looked like in 1939, compared with what it looked like in 1936.

A. Well, in my personal opinion, it was a great deal better proposition in 1939 than it was in 1936.

The Court: You mean from the standpoint of acquiring gas and selling it, from the standpoint of customers?

The Witness: Well particularly from the standpoint of customers. Am I permitted to just go a little off the direct question?

By Mr. Walker:

Q. Sure.

A. There was at that time prior to, well, up through 1939 and into 1941, apparently the Southern California Gas and the Pacific Gas and Electric had all the gas they wanted. And they were not buying any there now. They had torn out a lot of

(Testimony of Ralph W. Moore.)

their line from the Irma and from the Friend No. 1 and all those wells, and they just stood there and didn't want to buy any gas. Now, the Pure Oil Company was coming out, an independent, and if you gentlemen know anything about the oil business it is just a little bit difficult to come out and fight the Standard and the Union and a few others like that, and they were looking for a way to get this oil. If we had had [40] the resources to have gone on, it would have been a very different picture in a few years, another \$20,000.00. There was a market for the gas and the business was almost fantastic. The Southern California Gas was selling gas to that particular market at the time for 34 cents a thousand cubic feet.

Mr. Maiden: When was that?

The Witness: That was in 1935 and 1936, when we went into it. Those are the figures that were told me, and I believe they are practically correct. Our price would be 16 cents. If you can convert your kilowatt hour electricity into gas, you will find that with the price of gas at 16 cents, it is just about one quarter of the price of a horsepower of electricity.

By Mr. Walker:

Q. Both in 1939 and 1936, were you able immediately to get to making some money, or did you have to do something first?

A. Well, in 1936, we had to get a supply of gas. That was the basic feature.

Q. You say you needed a supply of gas in 1939,

(Testimony of Ralph W. Moore.)

too? A. Yes.

Q. You referred to the destruction of this Irma No. 1. I show you what purports to be a copy of a letter dated June 1, 1937, addressed to your attention of the Gas Fuel Service Company and ask you if you have seen that before? [41]

A. Yes, I saw the original of that.

Q. What is that letter?

A. Well, that is a notification that the Irma well had caved in and was not going to produce any more gas.

Mr. Walker: The Petitioner offers this letter in evidence as the Petitioner's next exhibit after the stipulation.

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit No. 9.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 9.)

PETITIONER'S EXHIBIT NO. 9

(Copy of copy)

Stratford, California

June 1, 1937

Gas Fuel Service Company

508 Security Building

Los Angeles, California

Attention: Mr. R. W. Moore

Gentlemen:

The Irma No. 1 has had a cave-in. Will make

(Testimony of Ralph W. Moore.)

only small amount of gas. May work itself out all right but cannot tell.

It caved last Saturday when they were shooting for tests on the seismograph near Veco 7-12.

Will watch well very close as it may stop entirely.

Yours truly,

/s/ JESS WELTON.

Admitted T.C.U.S. May 5, 1948.

The Court: We will suspend a few minutes.

(Short recess taken.)

The Court: Proceed.

By Mr. Walker:

Q. You have stated that Petitioner's Exhibit No. 9 was a letter you had received notifying you of the destruction of Irma No. 1. After having received notice of that destruction, what did you do?

A. I notified the Shell Oil.

Q. Why was it the Shell Oil Company that you notified?

A. Because they were the ones that did the damage.

Q. I show you what purports to be a copy of a letter dated June 2, 1937, addressed to the Shell Oil Company and [42] ask if you have seen that letter before?

A. Yes, I wrote the original.

(Testimony of Ralph W. Moore.)

Q. What is it?

A. Well, that is the letter notifying the Shell Oil Company that they had wrecked the Irma No. 1 well.

Q. In that letter you state that the destruction of Irma No. 1 was a very serious matter to Gas Fuel Service. Would you explain that a little bit further?

A. Well, it was serious because it shut off our supply of gas.

Q. Did it have anything to do with your certificate of convenience and necessity?

A. Well, I didn't think at the time it would particularly affect the certificate, because we still thought we could get some gas from other sources, but very frankly, and I presume that is what you want, I anticipated that our company would be able to collect some very substantial damages from Shell Oil Company for it. We were naturally putting our side of the case up to them from that standpoint.

Q. Then when you mentioned in there that it might endanger your franchise or your certificate, you were doing it for the purpose you have just stated?

A. Well, yes, the primary purpose of the matter, Mr. Walker, was to start what we expected would be a successful suit against the Shell Oil Company, or a settlement of a suit. [43]

Mr. Walker: Petitioner offers this letter as the next exhibit.

(Testimony of Ralph W. Moore.)

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit No. 10.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 10.)

PETITIONER'S EXHIBIT No. 10

(Copy of Copy)

June 2, 1937

Shell Oil Company
1008 West Sixth Street
Los Angeles, California

Attention: Land Department

Gentlemen:

Confirming our several conversations of today relative to the shutting off of the gas supply from the "Irma" No. 1 Well.

We are enclosing copy of letter from our Field Foreman, Mr. Jess Welton and are today advised by Mr. Welton in a telephone conversation that on last Friday, May 29 or Saturday, May 30, he was at the residence of James Skaggs, located in the Irma lease, when a seismograph crew reported to be employed by your organization made several shots within approximately one-quarter mile from the "Irma" No. 1 Well, and shortly thereafter gas practically ceased to flow from the well, and that at the time of our telephone conversation, 2:15 p.m. today, the gas practically ceased coming from the

(Testimony of Ralph W. Moore.)

well. He states that this seismograph crew reported to be employees of your company have been working in that vicinity for several days and have been conducting a seismograph survey running in a generally northeast and southwest direction approximately one-quarter mile east of the "Irma" No. 1 well which is located in Section 7, Township 23 South, Range 22 East, past the "Veco" 7-12 Well which is located in Section 12, Township 23 South, Range 19 East, and across the county road, then cutting in a generally northeast and southwest direction across Dudley Ridge.

Mr. Welton states that it appears to be general knowledge from conversations with the various members of this crew that they are employees of your company and that this work is being done for your account.

Our company is a public utility corporation holding a franchise from the Railroad Commission of the State of California for the sale of gas in Kings and Fresno Counties, California, with approximately 38 miles of pipe line laid from the "Irma" No. 1 Well through the farming section of the Tulare Lake Bed to approximately the outskirts of the town of Stratford, California, and is now and has been under this franchise selling gas for water pumping and domestic uses to its various customers in this territory.

As stated to you over the telephone, the shutting off of the gas from the "Irma" No. 1 Well is a

(Testimony of Ralph W. Moore.)

very serious matter to this corporation, as gas from this well is our present only available supply and interruption of this service may seriously interfere with our franchise rights.

In discussing the matter with your Mr. Merritt, he stated that he would endeavor to secure further information and call the writer back. We were somewhat surprised that if these men are your employees, a matter of this serious consequence would be left without your attention, as nothing further was heard from Mr. Merritt, and it was only after considerable effort that we finally were placed in touch with some representative of your company.

As stated during our last telephone conversation with your office, our immediate concern is to secure gas from some source to supply the requirements of our customers, and we are delivering this letter to you by special messenger with the expectation that if the shutting off of our gas supply has been caused by your employees, your company will take the necessary steps to supply gas for the temporary use of our company until such time as some satisfactory adjustment of the matter can be arrived at.

Very truly yours,

GAS FUEL SERVICE
COMPANY,

By /s/ R. W. MOORE,
President.

RWM S

Enc.

Admitted T.C.U.S. May 5, 1948.

By Mr. Walker:

Q. Did you call the destruction of that well to the attention of the Railroad Commission?

A. Yes, I believe that shortly after that we notified the Railroad Commission to that effect.

Q. I show you what purports to be a copy of a letter dated July 7, 1937, addressed to the Railroad Commission, and ask if you have seen that before?

A. Yes. I wrote the original.

Q. And what is the import and the purpose of the letter?

A. Well, Mr. Crenshaw had called me and asked me about it, and I had told him the facts of the case and I felt that, as they were the ones who had control of the certificate of necessity, they should naturally be notified of what had taken place up there.

Q. I notice in your letter it refers to the Watson No. 1. Is that the same thing as the Irma No. 1?

A. Yes, that is the—as I have explained before, there was a little confusion about the names, and the Watson No. 1 was the name under which it was recorded in the Bureau of Mines.

Mr. Walker: Petitioner offers this letter in evidence as its next exhibit.

Mr. Maiden: What is the date of that letter?

Mr. Walker: July 7, 1937.

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit No. 11.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 11.)

PETITIONER'S EXHIBIT No. 11

(Copy)

Central California Utilities Corporation
508 Security Building
Los Angeles
TR 5091

Gas Fuel Service Company

Kettleman-Lakeview
Oil & Gas Co., Ltd.

July 7, 1937

Railroad Commission of the State of California
708 State Building
Los Angeles, California

Attention: Mr. C. E. Crenshaw

Gentlemen:

Confirming our telephone conversation of this morning.

At approximately 11:00 o'clock on the morning of Friday, May 29, 1937, a crew of men who were employed by the Shell Oil Company of California, conducting a seismograph survey in Kings County, California, fired a "shot" within approximately one-quarter mile of the "Watson" No. 1 gas well operated for the account of this company. Immediately after the firing of this "shot" the flow of gas from our well rapidly diminished and a short time thereafter had practically ceased.

The "Watson" No. 1 well is located in Section 7, Township 23 South, Range 22 East, M. D. B. & M.,

(Testimony of Ralph W. Moore.)

Kings County, California, and is the source from which this company has been securing a supply of dry gas which it sells to agricultural users in that portion of the Tulare Lake Basin lying in a northwesterly direction from Dudley Ridge and extending to within a short distance of the town of Stratford.

Our company is a public utility corporation holding a franchise from the Railroad Commission of the State of California for the sale of gas in Kings and Fresno Counties, California, and has approximately 38 miles of pipe line laid from the "Watson" No. 1 well through the farming section of the Tulare Lake Bed as above referred to, and has been continuously selling gas under this franchise for water pumping and domestic uses to its various customers in this territory.

Immediately upon receiving notice from our field foreman of the shutting off of our gas supply, we communicated with the Shell Oil Company as per copy of letter attached hereto, and since that time have had several conferences with members of their land department in an attempt to secure some adjustment of the matter, including a supply of gas which would permit this company to continue the service to its customers, but have thus far received nothing but indefinite verbal statements from them.

We are now conducting negotiations with the Natural Gas Corporation of California at Taft,

(Testimony of Ralph W. Moore.)

California, trying to secure from them a temporary supply of gas for the use of our various customers.

Our company recently completed the drilling of an additional gas well on Dudley Ridge, but unfortunately when placed on production it developed a sufficient flow of water to prohibit its use, and we are now concluding arrangements under which an attempt will be made to shut off this water and place the well on production.

We have received numerous complaints from our customers who are dependent upon a supply of gas to operate their pumping equipment, and to whom the value of a gas supply is vital at this period of the year when the pumping season is about to start.

Our company is exerting every possible effort to resume service, and will keep your office fully advised of developments.

Very truly yours,

GAS FUEL SERVICE

COMPANY,

By /s/ R. W. MOORE,

President.

RWM S

Enc.

Admitted T.C.U.S. May 5, 1948.

By Mr. Walker:

Q. After the destruction of that Irma well, what was done to line up a gas supply?

(Testimony of Ralph W. Moore.)

A. Well, we tried several sources to procure gas. One was the gas company that was supplying gas to the little town of Kettleman City, the other was the Southern California Gas Company.

Q. Were such arrangements concluded with either of those companies?

A. Yes, with the Southern California Gas Company.

Q. I show you what purports to be a copy of a letter dated July 21, 1937, addressed to the Railroad Commission and ask if you have seen that letter before? [45]

A. Yes, I have seen it before.

Q. What is the import of that letter?

A. Well, immediately after——

Mr. Maiden: If your Honor, please, I think those letters should be allowed to speak for themselves.

Mr. Walker: All right, I was trying to identify that for the record. Perfectly all right with me.

By Mr. Walker:

Q. Do you know of your own knowledge, that the matters stated in that letter are accurate?

A. Yes.

Q. And are they accurate?

A. They are accurate.

Mr. Walker: The Petitioner offers this letter in evidence as its next exhibit.

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit No. 12.

(Testimony of Ralph W. Moore.)

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 12.)

PETITIONER'S EXHIBIT No. 12

(Copy of Ltr.)

Central California Utilities Corporation
508 Security Building
Los Angeles

July 21, 1937

Mr. C. E. Crenshaw
Railroad Commission of the State of California
State Building
Los Angeles, California

Dear Sir:

Confirming our telephone conversation of this morning, I am very glad to say that we now have gas in the line being supplied to us by Southern California Gas Company in the Standard Oil Pumping Station, Kettleman Hills.

This puts us in a position to care for all the customers on the line, and we have been assured by Southern California Gas Company of their cooperation in taking care of our needs to the fullest extent possible.

We want to thank you very much for your aid in this matter and hope shortly to be able to report some additional connections in that territory.

(Testimony of Ralph W. Moore.)

Again thanking you for your cooperation, we remain

Very truly yours,

GAS FUEL SERVICE
COMPANY,

By /s/ W. MARTIN LATHROP,
Vice-President.

WML S

Admitted T.C.U.S. May 5, 1948.

By Mr. Walker:

Q. How long did the Southern California Gas Company supply gas to the Central California Utilities, or its subsidiaries?

A. Why, it was a matter of comparatively few months. [46] I would say possibly three or four months, somewhere in there.

Q. And did it stop supplying gas?

A. Yes.

Q. Why was that?

A. Because we were not able to pay the bill for it.

Q. Why were you unable to pay the bill?

A. We didn't have any money in the first place, and in the second place, the losses of the gas as we purchased it from their meter and delivered to our customers, the line loss was so heavy that we were only receiving, I would say approximately 25

(Testimony of Ralph W. Moore.)

or 30 per cent of the gas that was finally delivered to the customers' plants being lost in the line.

Q. And you say that because of that you were not able to pay your bill to the gas company?

A. Well, no, the revenue from the sale of the gas was approximately 25 per cent of what we were paying for the gas, and we had no other source of funds, and we couldn't pay the bill.

Q. And then they shut off your gas, is that right?

A. That is right.

Q. I show you what purports to be a copy of a letter dated November 1, 1937, addressed to Gas Fuel Service Company, and ask if you have seen that before? A. Yes, I have seen that before.

Mr. Walker: Petitioner offers this letter in evidence [47] as its next exhibit.

Mr. Maiden: No objection. I didn't get the date of that.

Mr. Walker: November 1, 1937.

The Court: It will be received in evidence as Petitioner's Exhibit No. 13.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 13.)

(Testimony of Ralph W. Moore.)

PETITIONER'S EXHIBIT No. 13

(Copy)

Southern California Gas Company
810 South Flower Street
Los Angeles

November 1, 1937.

Wm. Moeller, Jr.
Vice President
In charge of Natural Gas
Production and Transmission

Gas Fuel Service Company
508 Security Building
Los Angeles, California.

Attention of Mr. W. Martin Lathrop,
Vice President

Gentlemen:

Referring to agreement dated July 21, 1937, between us, under which we are selling you gas delivered into your pipeline system near the Standard Oil pump station on Section 19, Township 22, Range 19, Kings County, California, we call your attention to the fact that gas bills rendered since the middle of August have been unpaid, and that there is now delinquent an amount in excess of \$1,112.86.

Pursuant to the terms of said agreement, this letter will serve as official notice of our election to terminate and cancel said agreement, effective ten days from date hereof, unless the amount de-

(Testimony of Ralph W. Moore.)

linquent to date is fully paid before the expiration of said ten days period. Upon the termination of this agreement, the Southern California Gas Company will apply any deposit which you have made, against the delinquent amount, and if such deposit shall be insufficient to cover such bill, the Company shall have the right to collect the balance of such gas bill by appropriate Court proceedings.

Yours very truly,

SOUTHERN CALIFORNIA
GAS COMPANY,

By /s/ WM. MOELLER, JR.,
Vice President.

By Mr. Walker:

Q. Now, your Irma No. 1 has been destroyed and you begin to buy gas from the Southern California Gas Company and they shut off your gas supply in the latter part of 1937. What was your opinion with reference to the merits of this project at that time?

A. Well, I thought that the proposition was still a very good proposition, that it had a temporary setback.

Q. When the Southern California Gas Company cut off your gas supply, then what did you do about the operation of the company?

A. I believe it was about that time that we started some negotiations with the Fullerton Oil to see if we couldn't get gas from their field.

(Testimony of Ralph W. Moore.)

Q. Did you say the Pure Oil?

A. No, the Fullerton Oil.

Q. Do you recall whether the company got permission of [48] the Railroad Commission with reference to discontinuing its service?

A. I believe we asked for a temporary discontinuance of service in the area.

Q. And when was that, do you recall?

A. My recollection of it was it was in the early part of 1938, but I am not definitely positive.

Q. Attached to the stipulation, Mr. Moore, as Joint Exhibit 5-E, is what has been stipulated to be a copy of an application filed by Gas Fuel Service Company to the Railroad Commission. I will ask if you have seen that before?

A. Yes, I have seen that before.

Q. Is that the application for temporary suspension of service? A. Yes.

Q. I show you Joint Exhibit 6-F, to the stipulation which has been stipulated to be a copy of the opinion of the Railroad Commission acting upon the application for temporary suspension of service, and ask if you have seen that before.

A. Yes, I have seen that before.

Mr. Maiden: Would you give the date of those two documents, just for the benefit of the Court?

Mr. Walker: Yes. That application is dated November 10, 1937.

The Court: If they are in the record, they [49] speak for themselves, do they not?

(Testimony of Ralph W. Moore.)

Mr. Walker: That is right. I was merely calling this witness' attention to them for the purpose of his knowing that that went on, so that they can be tied into the stipulation and his personal recollection.

By Mr. Walker:

Q. You have stated that the gas you had been purchasing from Southern California Gas Company had leaked through your lines. Do you recall why your lines leaked?

A. Well in the first place they were very cheaply built lines, they were practically all second hand pipe. A considerable portion of them were laid on top of the ground. Another portion of them were below the Lake Bed, the Tulare Lake Bed, and there had been a very severe flood and the entire area of the Tulare Lake Bed had been filled with water, and between all of these factors, the lines were in extremely poor condition.

Q. Did you have any inquiries from your customers about the fact that you no longer had gas in the line? A. Yes, we had many of them.

Q. Do you remember having received a letter from any of them making such inquiries?

A. I received one letter from a woman up there who had been buying small quantities of gas. She addressed a letter to the company. [50]

Q. I show you a copy of what purports to be a letter from Mrs. C. H. Meyers?

A. Yes, that is the woman.

(Testimony of Ralph W. Moore.)

Mr. Walker: Petitioner offers this letter as its next exhibit.

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit No. 14.

(The document above referred to was received in evidence and was marked Petitioner's Exhibit No. 14.)

PETITIONER'S EXHIBIT No. 14

(Copy of Copy)

Stratford, Calif.

Kettleman-Lakeview

Oil & Gas Co. Ltd.

I would like to know when you intend to let us have gas again?

What are we to do for heat this winter while you are temporarily discontinued? I would like an answer to this right away so we can make other arrangements for heating if you are not going to let us have gas.

Yours truly,

/s/ MRS. C. H. MEYERS.

At least say if we are to have gas soon.

Admitted T.C.U.S. May 5, 1948.

(Testimony of Ralph W. Moore.)

By Mr. Walker:

Q. Did you reply to Mrs. Meyers?

A. Yes, I answered the letter.

Q. I show you what purports to be a copy of a letter dated—under date of September 12, 1938, addressed to Mrs. C. H. Meyer, that's the way it is addressed, and ask if you have seen it before?

A. Yes, I wrote it.

Q. This is your reply to Mrs. Meyers?

A. That is my reply.

Mr. Walker: Petitioner offers this in evidence as its next exhibit.

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit No. 15. [51]

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 15.)

PETITIONER'S EXHIBIT No. 15

(Copy of Copy)

Central California Utilities Corporation

September 12, 1938.

Mrs. C. H. Meyer,
Stratford, Calif.

Dear Madam:—

We regret to advise that it will be impossible for us to resume distribution of gas until such time

(Testimony of Ralph W. Moore.)

as there is a demand for pumping purposes that will warrant such resumption.

You of course are aware that our charter does not provide for domestic service except where there is also a demand for gas for water pumping purposes.

It is our understanding that water conditions in the Tulare Lake section are such that at present there is no demand for water pumping and thus far we have had no request for gas for that purpose.

Yours very truly,

GAS FUEL SERVICE
COMPANY.

R. W. MOORE,
President.

Admitted T.C.U.S. May 5, 1948.

By Mr. Walker:

Q. Do you recall having written to the Railroad Commission with reference to the leaking lines and this flood damage which you have mentioned?

A. Yes, I think I wrote them with reference to it.

Q. I show you what purports to be a copy of a letter dated October 8, 1938, addressed to the Railroad Commission and ask if you have seen that before? A. Yes, I wrote the letter.

Q. Do you recall whether that was the first letter

(Testimony of Ralph W. Moore.)

you wrote to the Railroad Commission with reference to this flood damage?

A. I believe that was the first letter, yes.

Mr. Walker: Petitioner offers the letter in evidence as his next exhibit.

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit No. 16.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 16.)

PETITIONER'S EXHIBIT No. 16

(Copy)

Central California Utilities Corporation

October 8, 1938

Railroad Commission of the
State of California
706 State Building
Los Angeles, Calif.

Attention: Mr. Crenshaw.

Gentlemen:

Confirming our telephone conversation of the 7th. inst.

The gas service of this Company in Kings County, California, is now temporarily discontinued, under authority of Decision No. 30477 of your Commission, owing to the flooded condition of the land in

(Testimony of Ralph W. Moore.)

the territory where we were serving gas, principally for water pumping purposes but including a small amount used for domestic purposes by customers also using the gas for water pumping.

According to the best information obtainable from the former customers of our system it will be well into the year of 1939 before the present flood water recedes to a point where it will be necessary for those customers to require resumption of our service of gas for water pumping purposes.

We have had but one request for domestic service and that from a customer who did not sign our regular contract for gas for water pumping purposes but purchased small quantities of our gas for that purposes at irregular intervals. Copy of that request, and our reply thereto, are attached herewith.

The list of customers being served by us at the time of discontinuance of service, together with class of service furnished is:

| | Water Pumping | Domestic |
|---------------------------|---------------|----------|
| Consolidated Farms | Yes | Yes |
| Lester Owens | Yes | Yes |
| J. H. Hatteson | Yes | Yes |
| Fred Newton | Yes | Yes |
| J. R. Newton | Yes | Yes |
| F. E. Squire | Yes | Yes |
| O. C. Heck | Yes | Yes |
| Forrest Riley | No | Yes |
| C. H. Meyer | Irregular | Yes |
| Stratford School District | No | Yes |

(Testimony of Ralph W. Moore.)

The address of all of the above customers is Stratford, California.

Yours very truly,
GAS FUEL SERVICE
COMPANY,
/s/ R. W. MOORE,
President.

Admitted T.C.U.S. May 5, 1948.

By Mr. Walker:

Q. Do you recall, Mr. Moore, of actually having made an investigation of the customers in the Kings County, with [52] reference to their needs for gas service? A. Well, at what time do you mean?

Q. During the time shortly after you had had your gas shut off by Southern California Gas Company?

A. Yes. I went up there and talked with the majority of the customers.

Q. And did you talk with them after these—after the floods had damaged your lines?

A. Yes.

Q. I show you, Mr. Moore, what purports to be copies of letters dated February 24, 1939, and March 1, 1939, addressed respectively to the Central California Utilities Corporation and to the Railroad Commission. I will ask you if you have seen those letters before?

(Testimony of Ralph W. Moore.)

A. I have seen them before. I wrote this one.

Q. Do you remember receiving the February 24, 1939 letter?

A. You mean receiving it in the mail?

Q. Receiving it for action?

A. Yes. I remember that.

Q. And the March 1, 1939 letter is your reply to it? A. Yes.

Mr. Walker: Petitioner offers these letters as its next two exhibits.

Mr. Maiden: No objection. [53]

The Court: They will be received in evidence as Petitioner's Exhibits 17 and 18.

(The documents above-referred to were received in evidence and marked Petitioner's Exhibits Nos. 17 and 18.)

PETITIONER'S EXHIBIT No. 17

(Copy)

Los Angeles

February 24, 1939

File G. O. 58-A

Central California Utilities Corporation

508 Security Building

Los Angeles, California

Attention: Mr. R. W. Moore, President
Gentlemen:

This will acknowledge your report of October 8, 1938, regarding the temporary discontinuance of

(Testimony of Ralph W. Moore.)

gas service by your company due to the flooded conditions in the territory supplied by the Gas Fuel Service Company. In your report you stated—
“According to the best information obtainable from the former customers of our system it will be well into the year of 1939 before the present flood water recedes to a point where it will be necessary for those customers to require resumption of our service of gas for water pumping purposes.”

At this time we would request that you submit a report advising us as to the present status of this matter and also if possible, as to when you expect to resume gas service on the Gas Fuel Service Company system.

Trusting this will be given your prompt attention, we are,

Yours very truly,
RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA

By WILLIAM H. GORMAN,
Director, Southern District

CEC/gw

Admitted T.C.U.S. May 5, 1948.

(Testimony of Ralph W. Moore.)

PETITIONER'S EXHIBIT No. 18

(Copy)

Central California Utilities Corporation

March 1, 1939.

Railroad Commission of the
State of California.

708 State Building

Los Angeles, California.

File G. O. 58-A

Attention: Mr. William H. Gorman

Director, Southern District.

Gentlemen:—

Answering your letter of the 24th, ultmo.

While there has been some reduction in the flooded area referred to in our letter of October 8, 1938 it has not been of sufficient extent to call for resumption of the service formerly rendered by our Company and in that immediate section we do not anticipate any appreciable demand for gas for water pumping purposes until well into the summer of this year.

Yours very truly,

GAS FUEL SERVICE

COMPANY.

/s/ R. W. MOORE,

President.

Admitted T.C.U.S. May 5, 1948.

(Testimony of Ralph W. Moore.)

By Mr. Walker:

Q. Do you know, Mr. Moore, why the Railroad Commission had written you the letter of February 24, 1939?

A. There is so many of them it is a little difficult for me to locate them all. May I ask you just what was your question now?

Q. I wondered if you knew or had any idea why the Railroad Commission was writing that letter of February 24th.

A. Well, I had understood, in my conversations with various people there, that this was a public utility under their jurisdiction and they were following the progress of it as they did all others, and were asking for information.

Q. Did you feel that the Railroad Commission was about to take any action with reference to the certificate of convenience and necessity, in writing that letter?

A. No, I didn't think so.

Mr. Maiden: If your Honor please, I object to that as calling for a conclusion of this witness, what he feels that the Commission was going to do would be incompetent.

The Court: Objection is sustained. [54]

Mr. Maiden: I would like to ask that the answer be stricken.

The Court: The answer will be stricken.

By Mr. Walker:

Q. Do you recall, Mr. Moore, of ever having any negotiations at any time in 1939, looking to a dis-

(Testimony of Ralph W. Moore.)

position by the Capital Service or by the Central California Utilities Corporation of its position in the project? In other words, did anybody ever approach you to see if they could make a deal with you?

A. Why, yes. R. H. Anderson, who was the principal owner——

Mr. Maiden: If your Honor please, I object to this witness testifying to what some other person told him, upon the ground that it would be hearsay.

Mr. Walker: Well, if the Court please, this man was negotiating——

Mr. Maiden: I think that Mr. Moore can tell what he did toward negotiating, what he said and so on and so forth, but I object——

Mr. Walker: I will reframe the question, so that we will elicit from Mr. Moore only what occurred, because that is all I wish to go into anyway.

The Court: That is better.

Mr. Walker: All right. [55]

By Mr. Walker:

Q. Will you state, Mr. Moore, whether you made any representations with reference to this project in interesting other people in it?

A. Why, yes, R. H. Anderson, who was the majority holder in the leases which we previously had, called me up one day. I went over to the Biltmore

(Testimony of Ralph W. Moore.)

Hotel and talked with him. He asked if the company would be willing to——

Mr. Maiden: Your Honor, I object to him stating what this gentleman said. He can tell what, Mr. Moore can tell what he said to Mr. Anderson, but I submit that if they want to show what Mr. Anderson said, they should present him as a witness. It would be pure hearsay.

By Mr. Walker:

Q. Will you confine your remarks, Mr. Moore, to what you told Mr. Anderson?

A. Well, I told Mr. Anderson that I only had a minority interest in the proposition, but that I would submit the matter to Mr. Brashears and the others interested and I thought we would be in a position to make him an offer for our interests in the entire proposition.

Q. Did you take the matter up with Mr. Brashears? A. Yes.

Q. And did you submit such a proposition to Mr. Anderson? [56] A. I did.

Q. I show you what purports to be a copy of a letter dated March 16, 1939, addressed to Mr. Anderson and ask if you have seen that?

A. Yes, I wrote the letter.

Mr. Walker: Petitioner offers the letter in evidence as its next exhibit.

Mr. Maiden: No objection, your Honor.

The Court: It will be received in evidence as Petitioner's Exhibit 19.

(Testimony of Ralph W. Moore.)

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 19.)

PETITIONER'S EXHIBIT No. 19

503 Security Building.

510 South Spring Street.

Los Angeles, California.

March 16, 1939.

Mr. R. H. Anderson.
Haberfelde Building.
Bakersfield, California

Dear Sir:

The Gas Fuel Service Co. was incorporated on January 3, 1933, under the laws of the State of California, with an authorized capital of 1,000 no par value shares, of which 200 shares have been issued and are now owned by the Central California Utilities Corporation.

Gas Fuel Service Co. holds a Certificate of Public Convenience and Necessity (Franchise) issued by the Railroad Commission of the State of California, on July 3, 1933, under which it is permitted to operate as a public utility for the sale of gas for water pumping and other purposes in Kings and Fresno Counties, Calif., copy of the order of the Railroad Commission granting such franchise being attached hereto.

Operations under this franchise are temporarily

(Testimony of Ralph W. Moore.)
suspended owing to the flooded condition of the Tulare Lake farming section and lack of funds with which to extend the lines into other sections. Such suspension was authorized by the Railroad Commission of the State of California under date of January 3, 1938 and at the same time an increase in gas rates to Consumers in Kings County of from 16 cents per 1000 cubic feet to 20 cents per 1000 cubic feet was granted by the Commission. No request for increase in rates in Fresno County from the present established rate of 17 cents per 1000 cubic feet was asked of the Commission as no gas was being sold in that county.

Physical assets of Gas Fuel Service Co. consist of approximately 30 miles of 4", 3" and 2" pipe line extending from the present Friend well near Laguna Vista through portions of the Tulare Lake farming section and to within one-half mile of the Town of Stratford, Calif., together with meters and regulators necessary for the metering and regulating of gas delivered to customers.

There are issued and outstanding 317,363 shares of the capital stock of the Central California Utilities Corp. of which 252,400 are owned by the Capital Service Co. and R. W. Moore. The Board of Directors of Central California Utilities Corp. consists of two of the executives of the Capital Service Co. and R. W. Moore, so that entirely within the control of Capital Service Co. and R. W. Moore lies all of the legal and/or other necessary authority for the

(Testimony of Ralph W. Moore.)

disposal of the entire assets, franchise, etc., of the Gas Fuel Service Co. The most feasible method of transfer of these assets would be through transfer of the ownership of the capital stock of Gas Fuel Service Co. which can be purchased for \$40,000.00 in cash.

Yours very truly,

R. W. MOORE.

Admitted U.S.T.C. May 5, 1948.

By Mr. Walker:

Q. At the time you made the representations to Mr. Anderson as to what you have just stated, were the flood conditions still in being?

A. Yes. There were certain portions of the land that were still under water.

Q. And were any operations under way by the project at that time, in other words, were they distributing gas?

A. No, they were not distributing gas.

Q. Did you ever hear from Mr. Anderson with further reference to this? A. No.

Q. Did you have any further correspondence with the [57] Railroad Commission after the exchange of correspondence to which you have frequently referred? A. Yes.

Q. I show you what purports to be a copy of a letter dated August 14, 1939, and ask if you have seen that before? A. Yes, I have seen that.

(Testimony of Ralph W. Moore.)

Mr. Walker: Petitioner offers the August 14 letter in evidence as its next exhibit.

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit No. 20.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 20.)

PETITIONER'S EXHIBIT No. 20

(Copy)

Los Angeles

August 14, 1939

G. O. 58-A

Central California Utilities Corporation

508 Security Building

Los Angeles, California

Attention: Mr. R. W. Moore, President

Gentlemen:

Under date of March 1, 1939, you wrote us advising that while there had been some reduction in the flood area on your system, you did not anticipate any appreciable demand for gas service for water pumping until well into the summer of this year.

We would therefore appreciate your advising us at this time as to the present status of this matter and also, if possible, when you expect to resume gas

(Testimony of Ralph W. Moore.)

service on the Gas Fuel Service Company's system.

Trusting we may have an early reply we are,

Yours very truly,

RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA

By WILLIAM H. GORMAN

Director, Southern District

CEC:LC

Admitted T.C.U.S. May 5, 1948.

By Mr. Walker:

Q. I show you what purports to be a copy of a letter dated August 16, 1939, and ask if you have seen that before?

A. Yes, I saw that letter. I dictated the letter over the telephone. I was not in the office of Brashears at that time, but I dictated the reply.

Q. You say you were not at Brashears office at that time? A. No.

Mr. Walker: Petitioner offers the August 16, 1939 letter in evidence.

Mr. Maiden: No objection. [58]

The Court: It will be received in evidence as Petitioner's Exhibit 21.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 21.)

(Testimony of Ralph W. Moore.)

PETITIONER'S EXHIBIT No. 21

(Copy)

Central California Utilities Corporation

August 16, 1939

Railroad Commission of the State of California

708 State Building

Los Angeles, California

Attention Mr. William H. Gorman,

Director, Southern District

Gentlemen:

Answering your communication of August 14, 1939.

While the flood conditions in the Tulare Lake area in which our gas lines are laid have somewhat improved, they are still such that there is no demand for gas for water pumping purposes.

Consultation with various of our previous customers in that territory indicates that they will not be in position to use gas from our service until the late fall or early winter of this year.

Yours very truly,

CENTRAL CALIFORNIA
UTILITIES CORP.

By /s/ R. W. MOORE (Per J.A.A.)
President.

RWM:JAA

Admitted T.C.U.S. May 5, 1948.

(Testimony of Ralph W. Moore.)

By Mr. Walker:

Q. You stated you were not in Brashears' office at that time. Where were you?

A. I was out with the Timm Aircraft then.

Q. How long had you been at the Timm Aircraft?

A. I believe I went out there in May, 1939.

Q. And you say you left Brashears' office. Were you ever working for Brashears? A. No.

Q. Why did you say you were in his office?

A. Well, because the Central California Utilities had its headquarters there and he furnished the office space that we occupied.

Q. Did you ever receive a salary from Brashears or from these corporations? A. No.

Q. Did you have any further correspondence with the Railroad Commission?

A. Yes, I believe the correspondence continued for quite some time after that.

Q. I show you a copy of a letter dated December 13, [59] 1939, addressed to Central California Utilities and ask if you have seen that before?

A. Yes, I have seen that.

Mr. Walker: Petitioner offers the letter in evidence as its next exhibit.

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit 22.

(Testimony of Ralph W. Moore.)

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 22.)

PETITIONER'S EXHIBIT No. 22

Railroad Commission
of the
State of California
Fifth Floor, California State Building
Civic Center
San Francisco, Cal.

Los Angeles

December 13, 1939

File G. O. 58-A

Central California Utilities Corporation
508 Security Building
Los Angeles, California

Attention: Mr. R. W. Moore, President.

Gentlemen:

In response to our request you advised us under date of August 16th that the flood conditions in the Tulare Lake area had somewhat improved but at that time there had been no demand for gas service for water pumping purposes. You further stated that after consulting a number of your previous customers in this territory it did not appear that gas service would be rendered by the Gas Fuel Service Company until the late fall or early winter of this year.

(Testimony of Ralph W. Moore.)

Since we have not heard further from you to date we would be pleased to have you advise us as to the status of this matter and as to the possible date when gas service will be resumed in this area by the Gas Fuel Service Company.

Trusting this will be given your prompt attention, we are

Yours very truly,

RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA

By /s/ WILLIAM H. GORMAN,

Director, Southern District.

Admitted T.C.U.S. May 5, 1948.

By Mr. Walker:

Q. How was that letter called to your attention, Mr. Moore?

A. I believe Mr. Woodard read it to me over the telephone.

Q. At that time you were no longer at the office?

A. No, I was out with Timm.

Q. Do you recall having replied to that letter?

A. Yes, I believe I answered it.

Q. I show you what purports to be a copy of a letter dated December 26, 1939, and ask if you have seen that? A. Yes, I wrote that.

Q. That is your reply to the letter of December 13? A. Yes.

Mr. Walker: Petitioner offers the letter in [60] evidence as its next exhibit.

(Testimony of Ralph W. Moore.)

Mr. Maiden: No objection.

The Court: It may be received in evidence as
Petitioner's Exhibit No. 23.

(The document above-referred to was re-
ceived in evidence and marked Petitioner's
Exhibit No. 23.)

PETITIONER'S EXHIBIT No. 23

December 26, 1939

Railroad Commission of the
State of California
State Building
Los Angeles, California

Attention: Mr. William H. Gorman,
Director, Southern District.

Gentlemen:

Since receipt of your letter of December 13, 1939,
we have carefully checked the situation in the
Tulare Lake Basin and according to the best advice
which we received, there will be no possibility of
resumption of our gas service in that territory prior
to the early part of the summer of 1940.

Very truly yours,

CENTRAL CALIFORNIA
UTILITIES CORP.

R. W. MOORE,
President.

Admitted T.C.U.S. May 5, 1948.

(Testimony of Ralph W. Moore.)

By Mr. Walker:

Q. Did you have any more correspondence with the Railroad Commission?

A. Yes, I believe there were letters after that date.

Q. I show you a copy of what purports to be a letter dated June 18, 1940, and ask if you have seen that before?

A. Yes, I have seen that before.

Mr. Walker: Petitioner offers the letter in evidence as its next exhibit.

Mr. Maiden: No objection.

The Court: It will be received as Petitioner's Exhibit No. 24.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 24.)

PETITIONER'S EXHIBIT No. 24

(Copy)

Los Angeles
June 18, 1940
File G. O. 58-A

Central California Utilities Corporation
508 Security Building
Los Angeles, California

Attention: Mr. R. W. Moore, President.

Gentlemen:

In response to our request, you advised us under

(Testimony of Ralph W. Moore.)

date of December 26, 1939, that you had carefully checked the situation in the Tulare Lake Basin and according to the best advice you had received, there would be no possibility of resumption of service by the Gas Fuel Service Company until the early part of the summer of 1940.

Since we have not heard further from you, we would be pleased to have you advise us of the present status of this matter and the possible date when service will be resumed in this area.

Trusting we may have your prompt reply, we are

Yours very truly,

RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA

By WILLIAM H. GORMAN,
Director, Southern District.

CEC:S

Admitted T.C.U.S. May 5, 1948.

By Mr. Walker:

Q. Did you reply to that letter? A. Yes.

Q. I show you what purports to be a copy of a letter dated June 27, 1940, and ask if you have seen that? [61] A. Yes. I wrote the letter.

Q. Is that your reply to the letter of June 18?

A. Yes.

Mr. Walker: Petitioner offers the letter in evidence as its next exhibit.

Mr. Maiden: No objection.

(Testimony of Ralph W. Moore.)

The Court: It will be received in evidence as
Petitioner's Exhibit No. 25.

(The document above-referred to was re-
ceived in evidence and marked Petitioner's
Exhibit No. 25.)

PETITIONER'S EXHIBIT No. 25

(Copy)

Central California Utilities Corporation

June 27, 1940

Railroad Commission of the State of California
California State Building
San Francisco, California

Attention: Mr. William H. Gorman

Gentlemen:

The delay in replying to your letter of June 18
has been due to the time necessary to secure the
information requested by you.

So far as we can determine at the moment, there
will be no need for gas service from this corporation
until the Spring of 1941, as practically all of the
territory previously supplied by us is well supplied

(Testimony of Ralph W. Moore.)

with water until that time and will consequently have no need for our gas for pumping purposes.

Yours very truly,

CENTRAL CALIFORNIA

UTILITIES CORPORATION

/s/ R. W. MOORE,

President.

rwm;b

Admitted U.S.T.C. May 5, 1948.

By Mr. Walker:

Q. Did you have any other correspondence, Mr. Moore, with the Railroad Commission?

A. Yes, there was other correspondence.

Q. I show you a copy of a letter, or what purports to be a copy of a letter dated March 17, 1941, and ask if you have seen that?

A. No, I don't have any recollection. You mean seeing the original letter?

Q. Yes, seeing it or having it read to you?

A. I believe Mr. Woodard read that to me over the telephone.

Mr. Maiden: Is that the letter of May 17, 1941 to the Central California Company?

Mr. Walker: Yes. [62]

Mr. Maiden: I will stipulate it is a genuine letter, your Honor.

Mr. Walker: Petitioner offers the letter of May 17, into evidence as its next exhibit.

(Testimony of Ralph W. Moore.)

Mr. Maiden: No objection.

The Court: It will be received as Petitioner's Exhibit No. 26.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 26.)

PETITIONER'S EXHIBIT No. 26

(Copy)

Los Angeles

March 17, 1941

Central California Utilities Corporation

508 Security Building

Los Angeles, California

Application—No. 21581

Gentlemen:

Under date of March 4th our Engineer, Mr. Carl E. Crenshaw, telephoned your office relative to the status of the restoration of gas service by the Gas Fuel Service Company in the vicinity of Hanford and Stratford, California.

It is our understanding that it is your intention to permanently abandon gas service in this area. Under date of December 1, 1937 the Commission held a public hearing at Stratford, in connection with your Application No. 21581—in which you requested permission to temporarily discontinue service in Kings County and to revise certain gas

(Testimony of Ralph W. Moore.)

rate schedules. The Commission's order, No. 30477, was issued January 3rd, 1938, permitting a temporary discontinuance of service as requested in Application No. 21581.

This temporary discontinuance of service was for the purpose of repairing your gas lines and it was estimated that this work would be completed within 60 to 120 days. Subsequently, under date of June 16th, 1938, we received a telephone call from your Mr. Moore advising that the entire gas system of the Gas Fuel Service Company was under water as a result of a flood and he asked permission to discontinue gas service as such a condition constituted a hazard.

From time to time we have subsequently received letters from you advising as to the possible time when the Gas Fuel Service Company would resume gas service to customers in Kings County. The most recent communication was received on June 27th, 1940, in which Mr. Moore advised us that so far as could be determined there would be no need for gas service from the Gas Fuel Service Company until the spring of 1941, as practically all of the territory previously supplied by this company is well supplied with water.

Under the circumstances, in consideration it is your desire to abandon gas service in this area, it would be necessary that you make a formal application to this Commission, requesting permission to abandon such service.

(Testimony of Ralph W. Moore.)

In order that our files on this matter may be brought up-to-date, we would ask that you advise us as soon as possible as to your intentions regarding the restoration of gas service by the Gas Fuel Service Company.

Trusting this will have your early attention, we are,

Yours very truly,

RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA

By WILLIAM H. GORMAN,
Director, Southern District.

CEC-s

Admitted May 5, 1948 T.C.U.S.

By Mr. Walker:

Q. Do you recall of having talked on the telephone to anyone in the office of the Railroad Commission about the date of that letter, about March, 1941? A. No, I don't recall that.

Q. You see that it states that you had talked to them over the phone?

A. I believe that is correct.

Q. Do you recall whether you replied to that letter?

A. Well, it would be my impression that I did, but——

Q. I show you what purports to be a copy of a

(Testimony of Ralph W. Moore.)

letter dated March 25, 1941, and ask if you have seen that before?

A. Yes, I wrote that letter.

Q. Was that in answer to the Commission's letter of March 17? A. Yes. [63]

Q. Which had been read to you over the phone?

A. Yes.

Mr. Walker: Petitioner offers the letter of March 25, 1941 in evidence.

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit No. 27.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 27.)

PETITIONER'S EXHIBIT No. 27

March 25, 1941

Railroad Commission of the State of California
Fifth Floor, California State Building
Civic Center
San Francisco, California

Attention: Mr. William H. Gorman,
Director, Southern District

Gentlemen:

The delay in answering your letter of March 17 has been caused by negotiations which we are now conducting with certain interests looking forward

(Testimony of Ralph W. Moore.)

to the possible resumption of the Gas Fuel Service Company under its franchise. These negotiations are progressing as rapidly as possible and it is our hope that within a short period of time we will be able to submit some definite proposition for resumption of service. However, in the event these negotiations are not successfully concluded we will take up with the Commission the matter of abandonment of the franchise now held by the Gas Fuel Service Company.

CENTRAL CALIFORNIA
UTILITIES CORPORATION
R. W. MOORE,
President.

Admitted T.C.U.S. May 5, 1948.

By Mr. Walker:

Q. Do you recall whether around that time in March, 1941, you had written any other letters or made any representations in regard to possible sale or disposition of the project?

A. Yes, I recall that.

Q. Can you explain the circumstances under which such action was taken by you?

A. Mr. Woodard called me and asked me if I would write to Raphael Dechter and give him the complete setup of the entire proposition.

Q. Did you write such a letter?

A. Yes, I did.

(Testimony of Ralph W. Moore.)

Q. I show you what purports to be a copy of a letter dated March 25, 1941, addressed to Raphael Dechter, and ask if you have seen that? [64]

A. I wrote that, yes.

Q. Was that the letter you wrote Mr. Dechter at Mr. Woodard's request? A. Yes.

Mr. Walker: The petitioner offers the March 25 letter, 1941, to Mr. Dechter, in evidence.

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit No. 28.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 28.)

PETITIONER'S EXHIBIT No. 28

March 25, 1941

Mr. Raphael Dechter
417 South Hill Street
Los Angeles, California

Dear Mr. Dechter:

At the request of Mr. George C. Woodard of G. Brashears & Company I am writing you with reference to the Central California Utilities Corporation and its two subsidiary companies, the Gas Fuel Service Company and the Kettleman-Lakeview Oil & Gas Company. The Central California Utilities Corporation is a California corporation organ-

(Testimony of Ralph W. Moore.)

ized to act wholly as a holding corporation for the entire outstanding stock of the Gas Fuel Service Company and the Kettleman-Lakeview Oil & Gas Company, the stock of these two corporations comprising all of the assets of the Central California Utilities Corporation. This corporation has outstanding approximately 317,000 shares of \$1.00 par value common stock, this one class of stock being the only class of stock authorized for this corporation. Of this outstanding stock approximately 67,000 shares is in the hands of the general public, the remaining 250,000 shares being owned jointly by the Capital Service Company and the writer, the entire 250,000 shares being held in escrow under certain instructions of the Commissioner of Corporations of the State of California.

The Gas Fuel Service Company is a California corporation organized for the purpose of conducting a public utilities business in the distribution of dry gas for domestic consumption in the counties of Kings and Fresno, exclusive of service to incorporated cities; the general intent of this franchise being to permit this company to sell dry gas principally for water pumping purposes in the agricultural districts of Kings and Fresno Counties. It holds a franchise granted by the Railroad Commission of the State of California, which franchise is still effective, and did have franchises from the Supervisors of both Kings and Fresno Counties for the laying of its required gas transmission lines.

(Testimony of Ralph W. Moore.)

While these two franchises have not been definitely cancelled by the Supervisors of these two counties, it would be my opinion that a certificate of renewal would have to be secured from both these Boards of Supervisors prior to undertaking any work in connection with laying gas transmission lines. The outstanding capital stock of the Gas Fuel Service Company consists of 200 shares of \$100.00 par value common stock (this being the only class of stock authorized to be issued by this corporation) all of which 200 shares is held by the Central California Utilities Corporation.

The Kettleman-Lakeview Oil & Gas Company was originally organized as an operating company to hold certain gas leases and to drill for and supply dry gas to the Gas Fuel Service Company for sale by that company to the general public under the charter held by it. The capital stock of this company consists of 22,000 shares of \$5.00 par value common stock (this being the only class of stock to be issued by this corporation) all of which is held by the Central California Utilities Corporation.

The Gas Fuel Service Company formerly operated a gas distributing system extending from certain wells in the Tulare Lake Basin in a northerly and easterly direction to within a short distance of the town of Stratford and serving approximately 20 users of gas in the agricultural section between these wells and the town of Stratford. This line was of a temporary nature and after the flooding

(Testimony of Ralph W. Moore.)

of the area in the vicinity of Tulare Lake the pipe was sold and taken up by the purchaser so that the Gas Fuel Service Company now does not have any gas distributing lines or any physical assets other than its franchise.

The Kettleman-Lakeview Oil & Gas Company formerly held leases on approximately 3,000 acres of land in the Tulare Lake Basin, all of which leases were forfeited, and this company does not now have any physical assets.

During the time that the affairs of the above three corporations were active, they had very excellent prospects in that there was a large demand for gas from the various large ranchers in the franchise territory of the Gas Fuel Service Company and potential possibilities of selling large quantities of gas to various industries located within this franchise territory and the further possibility of selling gas to some of the large cities in Kings and Fresno Counties, this latter purpose to be accomplished by running its lines to the city limits and having these cities connect their present gas systems with this line, all of which would be strictly within its franchise rights. Negotiations were conducted with the City of Fresno who at that time was interested in purchasing large quantities of gas, and the Central California Utilities Corporation went so far as to conduct extensive negotiations with the Pure Oil Company who, at that time, were the owners of several gas wells in the Chowchilla

(Testimony of Ralph W. Moore.)

section, all of which were large producers of gas but which were then shut in.

In the various negotiations which we had with the Pure Oil Company, the City of Fresno, several large potential commercial users of gas, and with many of the larger ranchers, it was entirely feasible at that time to have sold several million feet of gas per day provided a permanent supply of gas could have been secured and money provided for the building of the lines. I am not personally familiar with the situation at the moment but from the latest information available I am of the opinion that if a permanent supply of gas could be secured and money provided for the laying of the necessary lines the market is still available and I believe the price of 16c per cubic foot which the Gas Fuel Service Company was authorized to charge for its delivered gas could be somewhat increased.

It is somewhat difficult to outline in detail and in letter form the entire situation with reference to the possibilities existing for a successful development of a gas distributing system in Kings and Fresno Counties such as authorized by franchise of the Gas Fuel Service Company, but if the matter has any real interest to the parties with whom I understand you are to take it up, I would be very glad to discuss the matter in detail with you and/or

(Testimony of Ralph W. Moore.)

them and furnish any other information desired which it may be possible to secure at that time.

Yours very truly,

CENTRAL CALIFORNIA
UTILITIES CORP.

R. W. MOORE,
President.

RWM:es

cc—Mr. G. C. Woodard

G. Brashears & Company

Admitted May 5, 1948 T.C.U.S.

By Mr. Walker:

Q. Do you recall having yourself talked to Mr. Dechter following your writing of that letter?

A. Yes, sir, I think he called me up for some little additional information and stated that the negotiations that he was working on looked favorable.

Mr. Maiden: Your Honor, I object to that, and move to strike that part of the answer.

The Court: Sustained. Answer stricken.

By Mr. Walker:

Q. Will you just state whether or not you made any further representations to Mr. Dechter?

A. I cleared up one or two little matters, particularly with reference to franchises from the county—from the two [65] counties, Kings and Fresno Counties.

(Testimony of Ralph W. Moore.)

Q. Do you recall whether in 1941 or any time after this letter to Mr. Dechter, you made any representations to any other people regarding this project?

A. Well, there were negotiations with a man named Ben Dudley.

Q. Who is he?

A. Dudley was the original discoverer of the Lost Hills Oil Field, and he had for many years been engaged in the oil business. He had done a lot of work on Dudley Ridge. In fact that is where the ridge secured its name from, Dudley Ridge.

Q. What sort of representations did you make him?

A. Why, he wanted to get a record of the——

Q. I am afraid we are going to walk into some more objections, now, Mr. Moore.

Mr. Maiden: Yes, you are.

By Mr. Walker:

Q. I just want to know what representations you made to him, not what he said to you.

A. Well, I made the representation to him that the property could be bought at a reasonable price, provided he could assure us that the people he was dealing with were legitimate and had the money to buy it.

Q. I show you what purports to be a copy of a letter [66] dated August 21, 1941, and ask if you have seen that before?

A. Yes, I wrote it.

(Testimony of Ralph W. Moore.)

Mr. Walker: The Petitioner offers that letter into evidence as its next exhibit.

Mr. Maiden: No objection.

The Court: It will be received in evidence as Petitioner's Exhibit No. 29.

(The document above-referred to was received in evidence and marked Petitioner's Exhibit No. 29.)

PETITIONER'S EXHIBIT No. 29

(Copy)

August 21, 1941

Mr. Ben B. Dudley
Victor Hotel
Los Angeles, California

Dear Ben:

There is enclosed herewith letter requested by you addressed to the State Mining Bureau, Division of Oil and Gas, authorizing them to furnish you any information you desire with reference to the dry gas produced by us from the Dudley Ridge well. If you have any difficulty in procuring this information from them, there is on file in the office of G. Brashears & Company in the filing cabinet where the Kettleman-Lakeview Oil & Gas records are kept a folder marked "Division of Oil and Gas" in which are the monthly reports made by the Kettleman-Lakeview Oil & Gas to the Division of

(Testimony of Ralph W. Moore.)

Oil and Gas on the production we have. In case you are not able to procure the desired information from the State Mining Bureau, if you will show this letter to Mr. George C. Woodard in Brashears' office he will make this folder available to you for the purpose of your procuring the desired information.

If you or your associates develop any interest in the franchise along the lines we discussed in Los Angeles yesterday, we will be interested in taking the matter up with you.

Yours very truly,

R. W. MOORE

RWM:es

cc—Mr. G. C. Woodard

Admitted May 5, 1949 T.C.U.S.

By Mr. Walker:

Q. You made a reference a moment ago, Mr. Moore, to the fact that you had supplied Mr. Dechter with additional information regarding franchises from Kings and Fresno Counties. What representations were those?

A. Well, in addition to the certificate of convenience and necessity, we had to have a franchise from each one of the counties of Kings and Fresno wherever we crossed a public road. Those franchises called for a certain amount of revenue based on the

(Testimony of Ralph W. Moore.)

gross sales, and we never had paid the county any—the sales never had reached the point, the minimum called for.

Q. Did you ever yourself take action to obtain such a franchise from either county?

A. No, no, they were already obtained when the Inland Public Service Company secured them in the first place. [67]

Q. And what was it again that you told Mr. Dechter about that?

A. Well I think in my letter I referred to that, and he asked me if they had been cancelled. Is that all right?

Mr. Maiden: That is all right.

By Mr. Walker:

Q. Did you know of your own knowledge if they had been cancelled? A. No, no.

Q. Why did you refer to that at all in your letter to him?

A. Well because I wanted Mr. Dechter to have all of the facts, and to turn everything over to him that I could supply, to the very best of my ability.

Q. Do you recall having mentioned to Mr. Dechter anything about the pipe lines?

A. I believe at that time the pipe lines had been taken up.

Q. And do you know the circumstances upon which they were taken up?

A. Why, yes. The company owed, I don't know, six or seven hundred dollars worth of local taxes,

(Testimony of Ralph W. Moore.)

which they were not in position to pay. The lines were absolutely of no value as gas transmission lines. We had this offer from Friend to buy them for, I believe \$2,000.00 and I recommended to [68] Mr. Woodard and Mr. Brashears that we sell them.

Q. Why did you go into such detail in presenting this picture to Mr. Dechter?

A. I don't—

Q. Well, you have written a three page letter to him, which is a fairly carefully worked out statement. I wonder if you were interested in getting anything yourself out of this project?

A. I don't know as I just understand your question. You mean in the way of commission or something of that kind?

Q. No. You said that you held a 25 per cent interest in the promotional shares.

A. That is right.

Q. Were you hoping to obtain something for those as the result of these negotiations?

A. Oh, certainly.

Q. And did you feel that you could have obtained something for yourself?

Mr. Maiden: If your Honor please, I object to that as calling for a conclusion of the witness upon an issue—

The Court: It is a leading question. Sustained.

Mr. Maiden: And it is a leading question, too.
By Mr. Walker:

Q. Did you have any reason to believe that you could obtain anything yourself from this project?

(Testimony of Ralph W. Moore.)

Mr. Maiden: Your Honor, I object to it upon the same ground.

The Court: Sustained.

By Mr. Walker:

Q. From your previous connection with the project to which you have testified rather at length, I would like to ask whether you felt that there was any material difference in the prospects for this project along in 1941, than they had had at previous times?

A. No, I still felt that all through that period that if the deal could be cleaned up and there was some adjustment could be made of the promotional stock that it was still quite strongly possible to interest others in the proposition and make it a really producing and successful company.

Q. How long did you have that opinion?

A. Well I had it until—I would say it was along perhaps in April or May of 1942.

Q. Did your opinion change then?

A. Yes, it changed materially, then because the entire gas situation was completely changed at that time. There was no gas and no possibility of getting the gas.

Q. Why was that?

A. Well, because everybody was using twice as much as they ever had before, and even in the territories like the [70] Los Angeles territory that gas up there is available through transmission lines to the Los Angeles territory, part of it is available there.

(Testimony of Ralph W. Moore.)

Q. What was there in 1942, to your knowledge, that produced that situation?

A. Well, there was a tremendous demand for gas, which raised the price of it.

Q. What made the demand, do you know?

A. Well, the war was on and industry and agriculture and everything else was booming very strongly.

Mr. Maiden: In other words, there was a greater demand for gas in 1942.

The Witness: Yes, yes.

By Mr. Walker:

Q. Did that greater demand that existed in 1942 influence your opinion as to what could be worked out of this project?

A. Well, I felt frankly that all of the gas that had been proven, the Pure Oil, the Superior Oil and the Fullerton Oil and several others, at the time we were conducting the negotiations and up until 1942, they were still prospects for purchases of this gas system or suppliers, I meant to say. At that time the P.G.&E.—

Q. That was because of the gas supply they had?

A. Yes. [71]

Q. And in 1942 they had no supply to meet such conditions?

Mr. Maiden: I object to that, your Honor as being a leading question. He is leading his witness, and I hate to have to keep objecting.

Mr. Walker: That is perfectly all right.

(Testimony of Ralph W. Moore.)

The Court: Sustained.

By Mr. Walker:

Q. Let us just start with a clean question. Here in 1942 what was this again now that led you to believe that this project could not be developed?

A. In 1942, I was quite thoroughly convinced that the big gas companies, the Pacific Gas and Electric and Southern California Gas, and the Shell Oil had made very extensive preparations to buy all of the gas that was available throughout that entire territory. Shell Oil had built a pipe line from Kern County all the way through to San Francisco.

Q. What does that have to do with your project?

A. Well, because it let out all of these people with their interest in the proposition when they built the line down there that took all the Fullerton Oil Company and Superior Oil Company gas.

Q. What do you mean by interest in the proposition?

A. Well, we had already discussed the matter with them at length, and they still evidenced some interest. [72]

Q. In what way? What was their connection to be?

A. Well, their connection frankly, was getting, having a chance to market their gas when they couldn't market it to the Southern California Gas, then that made them market it through the Central California Utilities.

(Testimony of Ralph W. Moore.)

Q. And these conditions which you have just testified about in 1942, when did they come into being?

A. Well, as far as I was personally concerned, in February, along in March or April in 1942, I tried, I started to find out if the condition still existed, if there was still a possibility that we might procure gas from some of these people and I found decidedly that there was not.

Mr. Walker: No further questions.

Mr. Maiden: Your Honor, what time do you intend to stop? At 12:00 o'clock? If you do, I would prefer waiting until after lunch to commence my cross-examination.

The Court: Well, off the record.

(Discussion off the record.)

The Court: Very well, gentlemen. We will suspend until 1:30.

(Whereupon at 11:50 a.m., a recess was taken until 1:30 p. m. of the same day.) [73]

Afternoon Session

1:30 p.m.

The Court: The witness may resume the stand.

(Testimony of Ralph W. Moore.)

Whereupon,

RALPH W. MOORE

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Maiden:

Q. I believe you stated, on direct examination, Mr. Moore, that you were not connected with Capital Service, Inc. at the time you arranged for the purchase or reorganization of the Inland Company in 1936?

A. No, I had no connection with Capital Service.

Q. Had you ever had any connection with Capital Service, either as an officer or as a stockholder?

A. No.

Q. You were not a stockholder in Capital Service, Inc.?

A. No.

Q. Did you become a stockholder in Central California Utilities Corporation?

A. Well, I had 25 per cent of the bonus stock.

Q. That is the promotional stock?

A. Promotional stock, yes. [74]

Q. Was that promotional stock put in escrow with the Corporation Commissioner?

A. I believe it was put in the Seaboard Bank or the Bank of America.

Q. In escrow under orders of the Corporation Commissioner?

A. Yes.

(Testimony of Ralph W. Moore.)

Q. Was that promotional stock ever released by the Corporation Commissioner?

A. Not to my knowledge.

Q. Now, at the time you took over from Inland Company, you first had California Utilities Corporation organized, is that correct?

A. Well, when we took over all the original—we took over the original promoters' shares under an agreement and after we had that agreement, then we organized the Central California Utilities Corporation.

Q. And the Central California Utilities Corporation then took over lock, stock and barrel, the two former subsidiaries of the Inland, that is the Gas Fuel, and the Kettleman Lakeview Oil Company, is that right?

A. Yes, that is correct.

Q. And the Central California Utilities Corporation became the sole owner of those two subsidiaries, is that correct? [75]

A. Yes.

Q. And that was true from 1936 on through 1942?

A. Yes.

Q. Did the California Utilities Corporation ever acquire any other properties than the stock of the Gas Fuel Service Company and the Kettleman Lakeview Oil Company?

A. No, I don't know whether the Dudley Ridge oil lease was taken in their name or not, but they did not acquire any physical property of any kind.

Q. Can you tell the Court whether or not the

(Testimony of Ralph W. Moore.)

only asset that the California Utilities Corporation had in 1936 clear on through to 1942 was the entire outstanding stock of these two subsidiaries?

A. Yes, that is all the assets they had.

Q. Now, this initial \$20,000.00 that was needed by the Central California Utilities Company in 1936, where did that money come from?

A. I believe the first \$4,000.00 of it, \$3,000.00 I believe was put up by Brashiers and I put up a thousand. Then the \$20,000.00 came from the Capital Service Corporation, to repay Brashears and myself for the initial money we put up.

Q. In other words, then the initial money that was put up by you and Mr. Brashears, of approximately \$4,000.00 plus the initial \$20,000.00 was put up by Capital Service, Inc., the Petitioner in this case? [76] A. Yes.

Q. Now, can you tell me, Mr. Moore who approached the Capital Service, Inc., the petitioner in this case, with respect to their investing in the Central California Utilities Corporation?

A. No, I couldn't tell you that.

Q. You don't know through what intermediary or source then, they became interested in this California Utilities Corporation? And actually agreed to make these investments?

A. Not of my own knowledge, no.

Q. Now, when the California Utilities Corporation took over the entire—that is took over the entire stock of the Gas Fuel Service Company and

(Testimony of Ralph W. Moore.)

the Kettleman Lakeview Oil Company in 1936, isn't it a fact that the Gas Fuel Service Company had several miles of gas pipe line laid and meters and so forth? A. Yes, that is true.

Q. Now, how many miles of gas pipe line did they have at that time, to the best of your recollection? A. Approximately 32 miles.

Q. And where was that 32 miles located? Was that located in Kings County or in Fresno County?

A. No, all in Kings County.

Q. All in Kings County? A. Yes. [77]

Q. Did the Gas Fuel Service Company own any gas pipe line or had they laid any gas pipe line in Fresno County? A. None whatever.

Q. They never did? A. No.

Q. Now then, in addition to the gas pipe lines of approximately 32 miles in Kings County that the Gas Fuel Company had in 1936, what other physical properties in connection with those lines, did the Gas Fuel Service Company have in 1936?

A. Didn't have any.

Q. Well now, the gas pipe lines, they did have meters that were attached to customers' houses or lines? A. Well, yes.

Q. Like they do in the cities.

A. That is right. There was a meter at each customer's house, either in his house or in his field, on his property.

Q. On his property? A. Yes.

Q. Did it have any automobiles?

(Testimony of Ralph W. Moore.)

A. It bought a Chevrolet truck, but I couldn't tell you without looking at the records whether it was the Gas Fuel Service or the Central California that owned the truck. I think it was the Gas Fuel Service, because it was used in their business. [78]

Q. In their business, did they have any kind of enclosed houses or anything like that along their gas pipe line at that time? A. No.

Q. Now I believe you stated that when California Utilities Corporation took over the two subsidiaries in 1936, that no gas was being distributed?

A. That is right.

Q. By the Gas Fuel Service Company?

A. That is correct.

Q. And I believe you stated that the reason for that was that a well that had been supplying gas to them had been exploded?

A. Well, the technical term would be blown out, so it is just about the same.

Q. Blown out? A. Yes.

Q. Who held title to the well that was blown out, Mr. Moore?

A. That was the Kettleman Lakeview Oil and Gas Company.

Q. All right. Now then, the other subsidiary, the Kettleman Lakeview Company, was it the purpose of that subsidiary, and is it not a fact that that subsidiary was to and did hold title to the gas leases and wells for the purpose of [79] supplying to its affiliate, the Gas Fuel Service Company, the gas

(Testimony of Ralph W. Moore.)

that it would be needing under its pipe line operation? A. Yes, that is correct.

Q. Now then, as of 1936, when the California Utilities Corporation took over the Kettleman Lakeview Oil Company, you stated that the Kettleman Lakeview Oil Company had some leases, oil leases?

A. I don't know as I quite follow you. There was a period of time elapsed in there, and the original lease that the Kettleman Lakeview Oil and Gas Company had consisted only of 60 acres on which this well was located that had previously blown out.

Q. Now, that belonged to the Kettleman Lakeview Oil Company, is that right?

A. Yes, I am quite sure that is correct.

Q. I believe you stated that some large oil company stopped that blowout, is that what you call it?

A. No, that is not correct. This was what was called the original Friend Anderson Well No. 1, located on the 60 acres of land, the lease of which was held by the Kettleman Lakeview Oil and Gas Company. Now, it blew out and that was the only well on that 60 acres then there. After we had drilled out the first well and drilled one new well, then we moved over to the Irma No. 1, or the Watson No. 1, whichever [80] you want to call it, and that was about a half or three quarters of a mile from this first Friend Anderson well on an entirely different piece of property.

Q. But the Kettleman Lakeview had a lease on that Friend Anderson well and it had a lease on

(Testimony of Ralph W. Moore.)

the—what was the name of the other well that you mentioned?

A. Well, it had several names. We called it Vaco 712.

Q. Now, that well, was that well stopped up at that time, just plugged up in 1936?

A. Yes. Whenever these operations started either in the latter part of 1935 or the first of 1936, that well was cemented in. It had a cement plug down inside of it.

Q. Had a cement plug down inside of it?

A. Yes.

Q. But the Kettleman Lakeview had a lease on that well?

A. Well, they had taken a lease on—they had given up the lease on the 60 acres and then taken a new lease on 750 odd, which included the 60 plus the land where this Vaco 712 was located.

Q. Now I presume that prior to the blow-up of the Friend Anderson well, that the Kettleman Lakeview had been supplying from that well, gas to the Gas Fuel Company, is that right?

A. That is correct, yes, sir. [81]

Q. Did they get sufficient gas from that well?

A. Oh, yes. That well was capable of producing at least, I believe the Standard Oil's field man and the Sunset oil man said from their records it was capable of producing economically some 8,000,000 feet of gas per day.

(Testimony of Ralph W. Moore.)

Q. Now then, the other well, the Vaco well, No. 7.

A. Yes.

Q. Had that been furnishing gas likewise to the Gas Fuel Service Company prior to that time?

A. Oh, no. Originally it sold its gas to the Pacific Gas and Electric Company.

Q. Well, didn't the Pacific Gas and Electric Company discontinue buying any gas?

A. They discontinued in the whole area. They had laid their own lines from one of their main supply lines, they had laid these primary lines over to all of these wells, Vaco 712 and another old one, and the line to the two Irma wells, which was about a mile and a half away from this, they had collecting lines of their own. They cancelled the contracts. They had just month to month contracts like all the rest of them, and they cancelled those and removed their pipe, but their pipe had been there better than two years, and they had bought gas from all those wells.

Q. From all those wells? A. Yes. [82]

Q. And they took up those pipes and used them some place else as pipes?

A. I assume they did.

Q. They took them up though?

A. Yes, they took them up anyway.

Q. I believe you stated that at that time, in 1936, you had an ample demand from customers to justify, in your opinion, the prospect that the Gas Fuel Company could be operated profitably?

(Testimony of Ralph W. Moore.)

A. Yes, indeed.

Q. Now, I believe that some time after 1936, either the latter part of 1936 or some time around the first part of 1937—you will correct me, of course, if I am not right.

A. If I can remember.

Q. —That the Kettleman Lakeview Oil Company secured two leases on some wells, a couple of wells. What wells were those?

A. Well, the Kettleman Lakeview Oil and Gas Company had a purchase option on the Irma No. 1 and Irma No. 2, which was the one named—in the Mining Bureau there, listed as Watson No. 1 and Watson No. 2; they are the same wells.

Q. They are the same wells?

A. Yes. They had a purchase agreement to buy both wells.

Q. Did the Kettleman Lakeview Oil Company operate those [83] two wells?

A. Yes. No, not the two, only the one.

Q. That is the Irma—

A. No. 1.

Q. Irma No. 1?

A. That is right.

Q. And they got gas from Irma No. 1 after the California Utilities Corporation took over?

A. They did, yes.

Q. I believe you stated, Mr. Moore that in your investigation of the prospects of this business, to determine what they had, and so forth, that you found there was some wells there either under lease or otherwise that had been plugged up or cemented

(Testimony of Ralph W. Moore.)

up, and you, of course, presumed that those wells, when this cement had been bored through, would reproduce the gas? A. Yes, that is correct.

Q. I believe you stated that later on when you drilled one or more of those wells, you found out that you either didn't get gas or else it was mixed with water?

A. Well, we got immense quantities of gas and we also got immense quantities of salt water, both at the same time.

Q. But you were not able to use the gas by reason of the water?

A. Oh, no, no, that is right. [84]

Q. Mr. Moore, did I understand that the companies, Central California Utilities and the two subsidiaries or either one of them, drilled this Irma No. 1 well, or did they just have it under some kind of a lease?

A. No, we drilled the one called the Friend No. 2, after we bored the cement out, took the cement plug out of the Vaco 712, we moved down from Friend No. 1 about a mile and a quarter and drilled an entirely new well, which we called Friend No. 2, and that also came in with water and gas.

Q. Did you drill any other wells after that?

A. No, that was the only one.

Q. That was the last. At what time would you place that, in what year would you place that?

A. Well that was the first job we did there, the second job we did with that \$20,000.00. I would say

(Testimony of Ralph W. Moore.)

that would be along in February or March of 1936, or approximately that time.

Q. Now, I believe you stated that up until the time you discontinued the operations under a temporary permit to do so, which would be some time the latter part of 1937, that you were not able to find any gas supply other than the supply that was—other than the supply that you were able to get on a temporary basis from the California—what is that company's name, Southern California?

A. Southern California Gas Company. [85]

Q. Is that correct? That is the only supply you had then available in 1937, in the latter part of 1937?

A. That was the only one that we had definitely available, yes.

Q. *Did have* in 1937, any other gas supply, other than the one you got from the Southern California Gas Company, that is the agreement you entered into with them for them to supply you with gas?

A. No, we had no other source of supply.

Q. No other source of supply. Now, Mr. Moore, did they have some kind of a flood up there in Kings County, the Tulare Lake region in 1937 or 1938? When was that?

A. It was my impression it was in 1937, but I would have to refresh my memory.

Q. It was either in 1937 or 1938?

A. Yes, that is correct.

(Testimony of Ralph W. Moore.)

Q. But the exhibits in this record would show that, probably. A. Yes, the record will show.

Q. Prior to the flood and while you were receiving service from the Southern California Gas Company, did it develop that your pipe line had sprung leaks to such an extent that it was not mechanically feasible to continue to purchase gas from the Southern California Gas Company?

A. It did. I believe that our records of the company [86] will show that we received approximately 24—we delivered approximately 24 per cent of the gas that went into the line at the meter of the Southern California Gas Company.

Q. And that condition developed for the first time during 1937?

A. Well, I wouldn't say for the first time, no. There were leaks in that line in various places.

Q. It became a major problem in 1937?

A. Yes, it became a major problem at that time.

Q. Then the flood comes along. What effect, if any did that flood have on the pipe line system?

A. Well, the pipe in many instances was laid on the top of the ground, in other instances it was laid right around the edge of what we call the Tulare Lake Basin, which is a tremendous big basin. These pipe lines were laid practically upon the slope of the bank that made the basin, either on a dyke that went across or on the natural bed of it, and as these waters came up there, naturally it washed it away by water, and in many cases it entirely exposed the line.

(Testimony of Ralph W. Moore.)

Q. Well, I believe you stated on direct examination that you recommended to the company that they sell all that pipe line?

A. Yes, I couldn't tell you the exact date, but that was my recommendation at the time. It was just prior to when it was sold. [87]

Q. Well, do you recall when it was sold?

A. My impression was that it was either late in 1940, or early in 1941, about in there. I don't know.

Q. In other words, are you definite about that now, Mr. Moore?

A. No, I cannot be definite. There are so many dates involved here, frankly, Mr. Attorney, I just can't keep them all straight in my head. I think the records would show that, if I might be permitted to——

Mr. Maiden: This is very important, your Honor, so I would like to take the time.

The Court: All right, take whatever you need.

By Mr. Maiden:

Q. Attached to the stipulation, Mr. Moore, which the parties have entered into is a general ledger sheet from the books and accounts of the Capital Service, Inc., and it shows that on April 30, 1940, an entry was made showing sale of pipe and crediting the account of the Central California Utilities Corporation with \$832.19. Now, is that your understanding of what the sale of that pipe line brought?

A. No, that is—may I look at this?

Q. Yes. A. That was in 1940.

(Testimony of Ralph W. Moore.)

Q. Well, the entry is made April 30, 1940, and there is a little notation there that is sale of pipe, and then it [88] credits the account of the Central California Utilities Corporation with \$832.19. Now, was that the entire amount for which you sold that pipe?

A. No.

Q. Do you recall how much the pipe brought?

A. Well, it was either \$2,000.00 or \$2,500.00, one or the other, it was a round sum.

Q. Do you know what became of the balance of the sum you received from the pipe?

A. Well, perhaps I misled you. The purchase price was not the same as we received, because the company owed a lot of local taxes, and the deal was that we would sell the pipe for either \$2,000.00 or \$2,500.00, and Mr. Friend was to pay all of the taxes and send us a receipted tax bill, plus his check, and that is the end of it, and I think you will probably find, in some of the other books, where the checks were recorded.

Q. In other words then, this credit of \$832.19 is the amount left from the sale of the pipe after you had paid off certain obligations of the Gas Fuel Service Company?

A. That is correct. I understand that is the net amount of cash received.

Q. Now, as to the date when you sold the pipe, we don't know at this time, but I will pass it for the moment; we know the date on which it was entered on the books of the [89] Capital Service

(Testimony of Ralph W. Moore.)

Corporation and credited to the account of the Central California Utilities Company. Now, after the Capital Service Company had sold all of its pipe lines, and I presume it sold its meters too?

A. Well just a minute, the Capital Service Company——

Q. I mean the Gas Fuel Company, at the time it sold the pipe line, it likewise sold the meters, too?

A. My recollection is this was a different transaction. We had a foreman up there that had not been paid for several months and had a labor claim against the company, and we gave him, I believe, the truck and the meters.

Q. Gave him the truck and the meters?

A. That is my recollection of it, in settlement of his claim.

Q. About when did that occur?

A. I would say it would be possibly two or three months after we sold the pipe or just about along in there.

Q. Now, it is a fact, then, Mr. Moore that subsequent to the sale of the pipe and the giving to this unpaid workman of the truck and the meters, the Gas Fuel Service Company had no other physical property, is that correct?

A. Are you speaking of subsequent or prior to those events?

Q. I mean subsequent to them?

A. No, it had not. [90]

Q. Now, I will ask you if it is not a fact that

(Testimony of Ralph W. Moore.)

at least by December 1, 1939, the Kettleman Lakeview Oil Company, the other subsidiary had no property whatsoever? A. Yes, that is correct.

Q. Now then, I believe you stated, Mr. Moore, on direct examination that the prospects of the Gas Fuel Service Company were greater in 1939 than in 1936, and also Kettleman Lakeview Oil Company, is that correct?

A. Well, I believe I said it was in my opinion, it was worth more then than it was in 1936, yes.

Q. In other words, it was your opinion that the value of the investment that Capital Service Inc., had in these corporations that we are talking about was greater than the value in 1936, at the time Capital Service made the investment?

A. Well, if I said that, that was not what I intended to say, and I don't believe I said it. I said we were considering the value of the proposition. The value of the proposition and the amount of the money that Capital Service had put into it, in my opinion, were two entirely separate and distinct entities.

Q. Well, do you have any idea what the nature of this law suit is about, Mr. Moore?

A. Very little.

Q. You don't know what the issue is? [91]

A. Well, all that I know of my own accord, is that there is some question about when the certificate, when the value of the certificate—

(Testimony of Ralph W. Moore.)

Mr. Walker: If the Court please, I fail to see the materiality of a question such as counsel has raised.

The Court: Let us test the witness about his knowledge. He has testified quite at length on direct examination.

Mr. Maiden: About conditions being better in 1939 than in 1936. We only want to find out what he means.

The Witness: Yes, if you will permit me to.

By Mr. Maiden:

Q. Yes.

A. If I haven't gotten that straight, I want to get it in. I said in my opinion, I thought the value of the entire project was as great if not greater, in 1939, than it was back in 1936.

Q. Well now, what was the entire project in 1936?

A. Well, the entire project in 1936 was related only to its selling gas to some, about five or six customers. By 1939, it had developed that there were a lot of other oil interests in that were drilling wells all around that were looking for markets for their gas, and my thought on that point right there was that at the time still in 1939, I thought we had greater prospects of interesting some substantial capital [92] than we had away back in 1936.

Q. In other words—

A. Because the demand for gas was continually increasing. A lot of these smaller municipalities

(Testimony of Ralph W. Moore.)

had organized their own, I believe they call it utility districts, I believe that was true with the town of Visalia and Tulare, and I had, even up to that time, I had conducted some negotiations with those people, looking to their financing a line from some of those gas supplies, up to where they wanted to use it, just exactly the same as I spoke this morning about the Fullerton Oil Company, our proposition when they approached us, was that they not only furnish us gas, but they also put up the money to build a line to deliver it with.

Q. Now then, these negotiations that you had with the Fullerton Oil Company and the Fuel Oil Company and any other negotiations that you had, did those negotiations occur in 1939?

A. You have me mixed there in that, because there was so many of them, frankly, Mr. Attorney, that it is difficult for me to tie them all in together. There were a lot of things happening there.

Q. Well, you know I am just trying to pin these factual points down as clearly as I can because this is necessary for the Court to be able to render justice between the parties in this case, that we get the facts as clearly as we can. [93]

A. I don't believe I could truthfully answer you that, Mr. Attorney, as to the exact date of it, whether it was 1939 or 1938.

Q. But you would say that those negotiations took place by December 31, 1939?

A. Well, would it be permissible to look at the

(Testimony of Ralph W. Moore.)

date of that letter that I wrote around July? I think that will clarify it.

Q. Yes, sir. You have that here. That is Petitioner's Exhibit No. 25. This is dated August 21, 1941.

A. Well, it was prior to that time. It would be my impression that the negotiations with the Fullerton Oil Company were in the latter part of 1940. That is to the best of my knowledge and belief.

Q. Did you have any negotiations with them prior to 1940? Do you believe they were prior to 1940?

A. I believe they were prior to 1940.

Q. Now, what other concerns, such as the smaller concerns, did you have negotiations with prior to 1940?

A. Well, I think I covered all that we had. There was the Superior Oil and Fullerton Oil. I discussed it with Lincoln Petroleum and then later the Anderson, another one the Ben Dudley, and Mr. Dudley's property, that is about all, and Nelson and Mrs. Irvine.

Q. And all of those negotiations broke down?

A. Yes, sir, they all did.

Q. They all broke down, and they all broke down at least by December 31, 1940. We can put it that way, trying to get that clear, is that correct?

A. I would say that is correct, yes.

Q. Now, Mr. Moore, I understand that the type of proposition you were putting up to these oil

(Testimony of Ralph W. Moore.)

people was, furnish us gas and lend us the money to put in the pipe line. Is that correct?

A. That is absolutely correct, yes, sir.

Q. Now, as a matter of fact, after you sold your pipe line if you had bought the gas, unless you had money enough to put in the gas lines, you could not have rendered any service under your certificate, or you could not have transacted any business at all, is that correct?

A. Let me see if I understand correctly. If we had gas and didn't have money to build the line, then it would be of no value, is that the substance of it?

Q. Yes, that is right.

A. My answer would be yes.

Q. And the California Utilities Corporation did not have the money, is that right?

A. No, they didn't have it.

Q. Did you approach the Capital Service, Inc., to see if they would put up more money? [95]

A. Well, I don't know as you understand my position in the matter. I was the president of these three companies you are talking about, and I had nothing to do with Capital Service in any way, shape nor manner.

Q. Except the Capital Service Company was the biggest stockholder that those corporations had, is that right?

A. That is correct, sir.

Q. And I presume that in view of that relation you must have had an acquaintance with at least some of the officers in Capital Service, Inc.?

(Testimony of Ralph W. Moore.)

A. Oh, yes, surely, I knew all the officers.

Q. But you never personally asked the Capital Service Inc. prior to 1940 to put up any more money?

A. I never asked Capital Service at any time to put up any money over the original deal.

Mr. Walker: At the time these negotiations started, I don't believe the Capital Service Company was in existence in 1935, was it? I think the record will show that it was organized in 1936.

The Witness: About 1936. Our original negotiations were about 1935.

By Mr. Maiden:

Q. I was talking about the years 1937 to 1940.

A. I was more or less familiar with some of the affairs of the Capital Service. For instance, their president had [96] talked to me about improving service, and I knew something about the money they had put into this Gas Service, but as far as having any official connection with Capital Service, I had none whatever.

Q. You mean you had none with Capital?

A. That is right.

Q. And you went to various concerns for capital?
A. That is correct.

Q. And you couldn't get that?

A. That is correct.

Q. Neither capital nor gas supply?

A. That is correct.

Q. And you did that prior to December 31, 1940?

(Testimony of Ralph W. Moore.)

A. Yes.

Q. When would you say that you first began trying to get more capital, back as early as 1937?

A. No, I don't think so, because the negotiations that were had with Mrs. Irvine, they were practically right in our own territory and we didn't need to have money over a thousand dollars or so, to hitch on the wells.

Q. I believe you testified on direct examination, those wells were all water wells, too?

A. That is right.

Q. So you couldn't get any gas from them at all? A. That is right. [97]

Q. Now, Mr. Moore, G. Brashears & Company, is that a pretty big operating company in Southern California, if you know?

A. Well, I would have no knowledge of my own, of any affairs of G. Brashears & Company.

Q. I thought I understood you to say that through your connections with that company you were able to arrange for the taking over of the Inland Company's properties, and buying these two subsidiaries?

A. Yes, that is correct. That would be only \$20,000.00 involved. That would not take a very big financial organization to supply \$20,000.00.

Q. I understood then, that the \$20,000.00 was put in by Capital Service, Inc., or by G. Brashears & Company. A. G. Brashears & Company first.

Q. If that had been—or had proven satisfactory,

(Testimony of Ralph W. Moore.)

G. Brashears & Company were to sell the shares to the public, but they did not offer those?

A. No, because the \$20,000.00 didn't warrant it.

Q. In other words, they were not willing to undertake to sell these shares to the public after the \$20,000.00 expenditure had turned out to be a loss, is that correct?

A. Well, you know that would be expressing Mr. Brashears' opinion and I wouldn't want to do that.

Q. All you know is that they did not attempt to sell [98] any of those shares to the public?

A. That is correct.

Q. Is it your opinion that the stock had any value—by the way, you were a stockholder in the Central Corporation I believe you said?

A. Yes.

Q. Has it been your purpose here as a witness on this stand to tell the Court that that stock had value up until 1942?

A. That is rather an embarrassing question. I believe now that I have testified to the effect that the entire proposition had as much value in 1939 as it had in 1936. Now with reference to the stock, I don't know whether I ever considered it from the stock angle, because there wasn't any stock outstanding except what we exchanged for the Inland. I was speaking of the proposition as a proposition.

Q. Now, how can you reconcile your statement with the facts which you have shown in this matter, and state that the proposition was just as good or

(Testimony of Ralph W. Moore.)

better in 1939, than it was in 1936, considering all of these conditions which you have testified to after 1936, including the sale of this pipe line and that if it had gas service available it had no pipe, when it had this well which was producing an adequate supply of gas and there was an ample demand for gas and less competition in 1936— [99]

Mr. Walker: If the Court please, counsel is trying to summarize all of the witness' answers to date. If he wants to ask a question relating to one thing, I have no objection to him repeating what the witness said on direct, but I object to him including everything that the witness has testified to.

Mr. Maiden: If the Court please, this is cross-examination.

The Court: This is cross-examination.

Mr. Maiden: And I think there is no doubt about what I am leading up to.

By Mr. Maiden:

Q. It is admitted through your testimony in this case that Gas Fuel Service Company, after you took it over and commenced to distribute gas to customers and did continue to distribute gas to customers up until you lost your only supply some time in 1937, when the Southern California Gas Company cut you off because of failure to pay your gas bill. Now, then, compare those conditions with the circumstances that existed in 1939. Even if you did have any pipe in 1939, as of the end of 1939, it was full of holes and leaks, and you couldn't economi-

(Testimony of Ralph W. Moore.)

cally operate the line, and considering also the fact that the Kettleman Lakeview Oil Company had absolutely no more leases on property at all as of December 31, 1939, how can you reconcile your statement that conditions were better [100] in 1939 than in 1936?

A. Well, you are putting something there that—that I didn't say. I didn't say the conditions were better. I said I considered the value of the certificate and the proposition as valuable in 1939 as it was in 1936. Now, speaking of this, and again there is a factor in that sort of situation, everybody knew it, it was a gambling speculation in 1936, and it was still a gambling speculation in 1939, and if we could have cleared up, of course Brashears and Brashears & Company and Capital Service, we owned 250,000 shares of promotional stock, and when we went to these other people then, the only major difficulty we had was very frankly, we were not willing to give up enough of our stock to particularly interest them in coming into it.

Now, by 1939, we had become pretty certain that our glasses perhaps were a little bit rosy, or that circumstances had proven that the deal was not as good as we thought it was going to be, but in 1939 even, there still was a market, there were plenty of people in the territory, and I felt that as far as the value of our equity in it, we still could have interested the people.

Q. That was in 1937?

A. Yes.

(Testimony of Ralph W. Moore.)

Q. Do you mean to tell the Court that in 1936, before entering into that enterprise, that the company had all that [101] pipe line, nearly 31 miles and that it had no leaks in it?

A. Oh, no, no. I never made any such statement as that.

Q. But you felt in 1936, that the pipe line was perfect, is that correct?

A. No, that is not correct at all. I never said any such thing. You can walk right along coming over from the Friend Anderson Well over there for about four and a half miles, lying right on top of the ground and you could walk right along and smell the gas coming right out of that, and we patched it there time and time again.

Q. Now, Mr. Moore, you were a stockholder in California Utilities. Was it your opinion that your stock had any actual value after 1940? [102]

A. Yes, I thought it had value.

Q. Did you think it had substantial value?

A. Yes, I thought it had substantial value.

Q. After 1940?

A. After 1940, that is right.

Q. Did you think it had substantial value in 1941? A. Yes.

Q. Did you think it had substantial value on January 1, 1942?

A. I thought it had substantial value to somewhere along in March or April, I believe I testified before, in 1942, when I found out. I had then

(Testimony of Ralph W. Moore.)

made a trip up through the valley. I talked with different people up through there, and I found out that the question of gas supply had very materially changed. There wasn't any gas then.

Q. But you now, as I understand, according to your testimony, you first became aware of the fact that there would be no gas supply for Gas Fuel Service Company in 1942, or did you become convinced of that prior to 1942?

A. No, it was in March or April that I started to check the general situation, and I found, in my opinion, at that time, that it was impossible to get gas.

Q. Well now, what conditions existed in 1942 as opposed to March of 1942, that made you believe that you had possibilities of gas supply in 1941, whereas you didn't have in March of [103] 1942?

A. Well by March of 1942, I convinced myself, or thought that I did—that none of the larger companies were going to be willing to deal with us at all.

Q. Well hadn't all of the larger companies turned you down by the end of 1940?

A. Well, they had turned it down on the basis that we put the proposition up to them, yes.

Q. Well, what made you suspect that they would later become interested in your proposition?

A. Well, I felt that if it was still continued to be impossible for them to sell their gas, that they would still be interested in talking with us.

Q. Well now, suppose you could have got someone to furnish you gas——

A. All right.

(Testimony of Ralph W. Moore.)

Q. —will you please tell the Court where you expected, by the end of 1940 to get the money sufficient to put down pipes and equipment necessary to render the service and go in business?

A. That is at the end of 1940?

Q. At the end of 1940.

A. Well, I am a bit puzzled on that one, because I can't recall the dates of all these negotiations that I had. Frankly I can't specify any particular one at that time because [104] those dates are not all fresh in my mind.

Q. Now, Mr. Moore, I will ask you if you can identify your signature on this letter. Is that your signature?

A. Yes, that is my signature.

Q. Now, I will ask you if this letter, which you just identified, of December 2, 1940, wasn't in reply to a letter to you dated November 22, 1940, by the Internal Revenue Agent in charge at Los Angeles, California?

A. Yes, I recall that letter.

Q. And in answer to this letter of November 22, 1940, from the Internal Revenue Agent?

A. Yes.

Mr. Maiden: I would like to offer a letter dated November 22, 1940, from the Internal Revenue Agent in charge, addressed to Mr. R. W. Moore, the witness now on the stand, as Respondent's Exhibit I.

The Court: And Respondent's reply thereto?

(Testimony of Ralph W. Moore.)

Mr. Maiden: I want to offer in evidence likewise the reply of Mr. Moore, the witness now on the stand, to the letter from the Internal Revenue Agent, dated December 2, 1940, as Respondent's Exhibit J.

Mr. Walker: I have no objection to the letters, your Honor. I would like to ask the witness questions about it, either now or later when Respondent's counsel has finished cross-examining. [105]

Mr. Maiden: Yes.

The Court: Very well. The letter from the Revenue Agent and the witness' reply thereto will be received in evidence as Respondent's Exhibits I and J.

(The documents above referred to were received in evidence and marked Respondent's Exhibits I and J.)

RESPONDENT'S EXHIBIT I

November 22, 1940.

Refer to: IT:F:Se

LPE

Mr. R. W. Moore,
503 Security Building,
510 South Spring Street,
Los Angeles, California.

Sir:

Reference is made to the corporation return for the year 1939, filed by the Central California Utili-

(Testimony of Ralph W. Moore.)

ties Corporation; information available indicates that you are president of this corporation.

Certain stockholders have claimed that the stock of this company became worthless in 1939. It is requested that you furnish information covering any event which in your opinion rendered the stock worthless. It is noted that the balance sheet of December 31, 1939 shows stock in subsidiaries, \$1,124,507.49. It is requested that the names of subsidiaries be furnished, with addresses and status in 1939, i.e., whether active or inactive corporations.

Please furnish also any information you may have as to merger in 1936 whereby stock in Inland Public Service was exchanged for stock of Central California Utilities Corporation.

Please furnish this information for the attention of IT:F:Se-LPE.

Respectfully,

/s/ GEORGE D. MARTIN,

Internal Revenue Agent in
Charge.

LPE:gb

Admitted May 5, 1948, T.C.U.S.

(Testimony of Ralph W. Moore.)

RESPONDENT'S EXHIBIT J

[Letterhead]

Timm Aircraft Corporation

December 2, 1940

Att: IT:F:Se

LPE

Internal Revenue Agent in Charge

Los Angeles Division

Internal Revenue Service

12th Floor, U. S. Post Office and Courthouse

Los Angeles, California

Dear Sir:

Answering your letter of November 22, 1940.

The stock in subsidiaries, \$1,124,507.49, reported by the Central California Utilities Corporation as at December 31, 1939 represented the book value of the Gas Fuel Service Corporation and the Kettleman-Lakeview Oil and Gas Company, both of which were wholly owned subsidiaries of the Central California Utilities Corporation.

The Central California Utilities Corporation is a holding corporation for the Gas Fuel Service Corporation and the Kettleman-Lakeview Oil and Gas Company and has no assets other than the stock of these two corporations. The Gas Fuel Service Corporation was granted a franchise for the distribution of natural gas in certain portions of Kings and Fresno Counties, California, and at one time had approximately thirty-eight miles of pipe line laid

(Testimony of Ralph W. Moore.)

in the vicinity of Tulare Lake serving several ranchers with natural gas.

The flood conditions which existed in the Tulare Lake Basin during 1938 flooded a major portion of the territory served by the Gas Fuel Service Company and resulted in discontinuance of this gas service.

During the early part of 1939 the company sold its pipe line which had by them become unfit for the transmission of gas, and today it has no assets of any nature other than the questionable value of its certificate of public necessity under which it was permitted to sell gas.

The value given on its Balance Sheet for rights and franchise has a value only as its operations are resumed, such value being commensurate with whatever profit this corporation might be able to earn from its operations, all of which now are suspended.

The Kettleman-Lakeview Oil and Gas Company was organized to serve as an operating company for the production of natural gas for sale to the Gas Fuel Service Company. At one time it held leases on a large number of acres of potential gas producing land at Dudley Ridge and vicinity in Kings County, California, and attempted to drill gas wells thereon. These wells were not productive and the leases were surrendered with a result that the Kettleman-Lakeview Oil and Gas Company has no assets of any nature.

(Testimony of Ralph W. Moore.)

The Address of the Central California Utilities Corporation, the Gas Fuel Service Company and the Kettleman-Lakeview Oil and Gas Company is room 503 Security Building, 510 South Spring Street, Los Angeles, California, and they were all three inactive corporations in 1939.

It would be my personal opinion as the principal officer of the three above corporations that their stock became practically worthless in the early part of 1939.

With reference to the merger in 1936 of the Inland Public Service Corporation with the Central California Utilities Corporation, please be advised that one share of the common capital stock of the Central California Utilities Corporation was exchanged for three shares of the stock of the Inland Public Service Corporation with respect to all such stock held by the general public, with respect to certain promotion stock held by the originators of the Inland Public Service Corporation, the method of exchange was on a definite basis under which they received a substantially lesser number of shares than were given to the general public.

I trust the above is the information desired by you and if not, I will be glad to go into further detail upon request by you.

Very truly yours,

/s/ R. W. MOORE.

Admitted May 5, 1948, T.C.U.S.

(Testimony of Ralph W. Moore.)

The Court: You will have the right to examine the witness.

Mr. Maiden: He has redirect, yes, I understand that, your Honor.

By Mr. Maiden:

Q. Now, Mr. Moore, in your letter to Mr. Ben Dudley, which is dated August 21, 1941—

The Court: Is that an exhibit?

Mr. Maiden: That is Petitioner's Exhibit No. 29. Thank you, your Honor.

The Court: All right.

By Mr. Maiden:

Q. —was with respect to having Mr. Ben Dudley, I believe, as you testified, find a purchaser, or either purchase himself some property. Now, I just wondered what property you meant?

A. Well, as I read this, it says, "If you or your associates develop any interest in the franchise"—that [106] would appear to be quite clear. Wouldn't it be the franchise we are talking about. I mean, I used the word "franchise." It should be "certificate of convenience and necessity." It should be certificate? A. Yes.

Q. Now, were you under the impression that you could sell the certificate of necessity that you had to some other corporation?

A. No, no. I figured we would have to sell him the stock of the company in order to do that.

Q. I see. But this availed you nothing, I believe? Did you ever hear from Mr. Dudley about it?

(Testimony of Ralph W. Moore.)

A. Nothing except once or twice he telephoned me about it and I assume I am not permitted to testify as to what he said at that time.

Q. That is right. Now, I believe you have testified that you never, at any time exercised the franchise which you had obtained from Fresno County, by operating any pipe line or operating at all?

A. You are still referring to the certificate of—

Q. This I am referring to is the County franchise.

A. Oh, the County franchise. No, we did not.

Q. You never did?

A. No, we never laid any line from Fresno.

Q. I guess it is your testimony that after you sold [107] this pipe line that the Gas Fuel Company did have in Kings County—that you never thereafter laid any pipe line?

A. That is correct.

Mr. Maiden: I believe that is all, if the Court please.

Mr. Walker: May I have just a few moments, if the Court please?

First I would like to discuss the Respondent's Exhibits I and J, which have just been introduced.

The Court: Well, discuss them, what do you mean?

Mr. Walker: Well, I would like to ask the witness further questions about them.

The Court: You want to interrogate the witness concerning them?

(Testimony of Ralph W. Moore.)

Mr. Walker: Yes.

The Court: That is all right.

Redirect Examination

By Mr. Walker:

Q. Did you understand from this inquiry you received from the Revenue Agent, Mr. Moore, what stockholders of Central California Utilities might have claimed that their stock had become worthless in 1939?

A. No, I have no knowledge of that.

Q. Did you know whether the stock of Capital Service in that project was some of the stock which was under consideration? [108]

A. No, I had no knowledge of what the individuals, the individual stockholders were that the agent referred to.

Q. Well, did you know what stockholders or how many stockholders of Central California Utilities there were, roughly speaking, in general terms?

A. Why, I would say there was possibly around a hundred, something like that.

Q. And they were the individuals, I believe, you testified on previous direct examination, that had received shares in Central California Utilities in exchange for their shares of Inland?

A. Yes.

Q. Did you have any reason to believe when you answered this letter of December 2, 1940, that the certificate of public convenience and necessity

(Testimony of Ralph W. Moore.)

under which it was permitted to sell gas wasn't in effect or was not in effect?

A. No, I felt very definitely it was in effect.

Q. I note you state in the letter that the only asset that the company had was this certificate which was of questionable value, and I ask you why you made that statement.

A. I think it was of questionable value until such time as you could prove it, just the same as an oil well is of questionable value until you bring it in.

Q. Now, you stated also that the value on the balance sheets for the rights and franchises had a value only as operations [109] were resumed. Were there thoughts in 1940 of resuming operations?

A. Oh, definitely so.

Q. Were there any of a specific nature at that time with reference to—

Mr. Maiden: Now, if your Honor please, I am going to object to this entire line of redirect examination upon the ground that I want the Court to look at these two documents, and these two documents speak absolutely and unequivocally for themselves. There is absolutely nothing ambiguous about them, and I don't think it is proper to have this witness now, in view of the statements made in that letter to try to put some other explanation upon the subject matter treated in those letters.

Mr. Walker: If the Court please, I understand exactly why counsel wants the letter in. It is cer-

(Testimony of Ralph W. Moore.)

tainly obviously material. I have no objection to it on that ground. The letter states matters that the witness has stated to an individual in the Revenue Agent's office. I think we have an interest to know why he made his statements.

The Court: Don't you think the letter speaks for itself?

Mr. Walker: Well, the letter makes statements which I would like to have explained, and in the surrounding circumstances, that is all. [110]

Mr. Maiden: Well, if your Honor please, for example, I might state that the revenue agent wrote Mr. Moore telling him that certain stockholders of the Central California Utilities Corporation were claiming under the 1939 returns that their stock became worthless in that year and wrote Mr. Moore for information as to the financial condition of the Central Utilities Company in that year, otherwise, whether in his opinion, their claim had a basis, in fact, and he replies and reviews the financial condition of the Central California Utilities Corporation, and he states that the only assets that it had in 1939 was the certificate of public necessity which was of questionable value, belonging to the Gas Fuel Service Company that had no other assets, nor did the other subsidiary have any assets. Then he makes the statement, "It would be my personal opinion, as the principal officer of the three above corporations, that their stock became practically worthless in the early part of 1939."

(Testimony of Ralph W. Moore.)

Mr. Walker: Well now, it is right there your Honor. I would like to ask him what he meant by "practically worthless." I have no quarrel with the letter itself, at all.

The Court: The objection will be overruled. I will hear the witness. Naturally, from an evidenciary standpoint, the expression of a witness in writing back at this crucial time would carry more weight, than the evidence of a witness at a hearing where he is advised specifically and knows what issues counsel seeks to elicit from him in the building up of the case.

Avoid leading questions, and you may ask him the question that you suggest.

By Mr. Walker:

Q. Can you state to the Court, Mr. Moore, what you meant when you stated that in your opinion the stock was practically worthless in the early part of 1939?

A. Yes, I would be glad to. I think perhaps I am a bit confused. I try not to be, but I considered the thing from two angles: One, the value of the franchise, the other the actual saleable value of the stock that these people had. When I said to you and the others that I considered the proposition as valuable in 1942 as it was in 1936, I had in mind that there would have to be a reorganization and that there would have to be a general revamping of the structure, but that the franchise, as a franchise, was extremely valuable. That was my honest opin-

(Testimony of Ralph W. Moore.)

ion, and when I spoke there about the stock becoming worthless, I didn't figure that the stockholders or Mr. Brashears and myself were going to be permitted to retain all the equity that we had in that company unless it was revamped and additional money was provided——

The Court: Mr. Witness, will you please confine yourself to the question propounded.

The Witness: All right. [112]

Mr. Maiden: I am going to move, your Honor, that I think that whole answer is so unresponsive that it should be stricken. Let him give another statement.

The Court: The motion will be granted and the answer stricken.

Now, the witness should confine himself to the question propounded without going outside to make explanations.

The Witness: I am sorry that I did.

By Mr. Walker:

Q. Will you merely state in your own language, then, what you meant when you said that in your opinion the stock of the Central California Utilities Company had become practically worthless in the early part of 1939?

A. I had in mind that the stock was practically worthless unless something could be done in the future with that company to put it back on its feet.

Mr. Walker: I have no further questions.

Mr. Maiden: I am willing to rest on the correspondence. I have no further questions to ask.

(Testimony of Ralph W. Moore.)

Mr. Walker: I have no further questions on that one letter, your Honor. I have just one or two more questions.

The Court: Proceed.

By Mr. Walker:

Q. Could you state, once more, the status of the pipe [113] line in Kings County in 1936, when you people went into the project?

A. Well, part of the line was laid on top of the ground, part was laid around the bed of Tulare Lake, and a portion along the road that led up to Stratford.

Q. Did you feel that that pipe line was sufficient to enable the company to operate profitably?

A. Well, you mean the length of the pipe line sufficient or the size of it?

Q. The size in 1936 when you went into the project.

A. No, I thought they would have to have some additional line.

Q. For how long a period did you have honest hopes of getting gas production back into operation in Kings County?

A. Well, my impression of the date would be in '41.

Q. You continued to have hopes of getting it into operation until 1941?

A. Yes, in Kings County.

Q. You have stated in connection with this letter

(Testimony of Ralph W. Moore.)

you wrote to the revenue agent that the stock was practically worthless. Can you state what you thought its value was in 1936?

A. You mean at the start?

Q. That is right.

Mr. Maiden: Your Honor, I object to that. I don't [114] think that is competent. We are dealing here with the determination. They are claiming that it was worthless in 1942. If it was worthless in any prior years, then they haven't got any prior case.

Mr. Walker: I am trying to point out the feeling behind the word "practically."

The Court: Has this witness qualified as an expert on valuations of stock? He has attempted to give the physical properties back of the stock, and isn't a determination as to what that stock is worth a matter for the Court?

Mr. Maiden: It is, your Honor, in my view, solely within the province of the Court.

The Court: The witness is, as I recall, not qualified on the stock.

Mr. Walker: Then I would object to that letter he wrote, wherein he expressed that opinion, that in his opinion it was practically worthless, and have the letter that he wrote to the revenue agent competent to state the facts only that he otherwise stated in that letter. In other words, if the Court please, the witness is obviously familiar with this project there. He has been president of the com-

(Testimony of Ralph W. Moore.)

pany since the Inland Company was reorganized in 1936, and he is being asked by an Internal Revenue Agent what his opinion was, and he stated that opinion in this letter that is now in evidence.

The Court: He stated in the letter that it was practically [115] worthless. You interrogated this witness as to what he meant by the expression, "practically worthless." Of course, that is not a definite term and is subject to some explanation. Now, you would have the right, within the rules of evidence to have this witness' interpretation of what he means by "practically worthless," but I don't understand that that qualifies him as an expert witness in stock valuation.

Mr. Walker: No, no, we are not purporting to put him up as an expert on that particular thing.

The Court: You have had the privilege of interrogating this witness on the matter you are complaining about in this letter.

Mr. Maiden: If the Court please, I think what Mr. Walker had in mind was that the letter in effect, expresses an opinion of this witness, based upon his knowledge of the assets held by the corporation as of that time.

The Court: Yes.

Mr. Maiden: I think that is—of course, it is quite obvious that this letter could serve Respondent more than one purpose. I don't like to say out publicly for what purpose; it is not necessary, but it could serve more than just one purpose. Now,

(Testimony of Ralph W. Moore.)

of course, this letter was written Mr. Moore by the Bureau of Internal Revenue posing a very vital question, and asking him to furnish them reliable evidence upon which to treat claims of worthlessness of this stock in 1939. [116] Of course, Mr. Moore knew that when he wrote that letter, and I think upon the basis of the physical condition of the company, that he states there, and then gives his opinion, I think that is something quite apart from trying to qualify a man and qualifying a man as an expert. I think your Honor is absolutely correct on that. I think that the letter is competent, as I say, in more ways than one.

Mr. Walker: Well, if the Court please, we are not trying any case but this particular one right now. We are interested, as I said, to elicit the facts concerning this project and what this witness knows about it. That is my only purpose.

The Court: Well, counsel for the petitioner had the opportunity of interrogating this witness as to what he meant by the expression, "practically worthless." You still have that right, if you have not pursued it to the full extent you desire to, but as I see it, to now ask this witness on redirect examination strictly a question that requires expert knowledge without the witness qualifying along that line would be incompetent.

By Mr. Walker:

Q. Mr. Moore, could you further explain your term, "practically worthless," by reference or by

(Testimony of Ralph W. Moore.)

using it in connection with your opinion of value at any other time?

Mr. Maiden: Now, if the Court please, I think it is [117] objectionable to ask this witness anything other than what he meant by the use of the words, "practically worthless," in that letter.

Mr. Walker: That is what I am trying to do.

The Court: Direct your question along that line. It is competent and proper for you to elicit that from the witness, as to what he meant by the expression, "practically worthless."

By Mr. Walker:

Q. Well, Mr. Moore, you have used this term, "practically worthless." Is it true that—

The Court: Ask him what did he mean by that.

Mr. Walker: Well, I have asked him that once, and he hasn't seem to rise to the bait.

The Court: Then you shouldn't suggest answers to the questions or ask leading questions. I beg your pardon for interrupting, but I knew that was coming. I could see from the attitude of counsel for the Respondent. He was just ready to raise the objection. He could explain the matter.

By Mr. Walker:

Q. Would you state to the Court once more, what you mean by, "practically worthless"?

A. My use of that word was based upon the asset values shown in the balance sheet and on the books. The stock as a stock certificate was practically worthless at that time, because [118] I didn't think

(Testimony of Ralph W. Moore.)

anybody would buy it with that balance sheet in front of them, and that is what I tried to get across, that I had two different opinions. One was the value of the stock is one thing, the value of the franchise as the equity or the intangible asset that was there was what I tried——

Mr. Maiden: Now, your Honor, that last part of his answer is not responsive and I ask that it be stricken.

The Court: Wouldn't that add to the value of the stock?

The Witness: I am a bit confused.

The Court: You have made a segregation there of values.

Read the question again, Mr. Reporter. Let's try and get this straightened out.

(The question was read.)

Mr. Walker: I think I can point out where I think this divergence comes.

Where you deviated, Mr. Moore, was where you stated what would be the value of the stock—would be what a person would see on the balance sheet and where you split off to what you thought this franchise was worth. So I will merely ask you, when you said, "practically worthless," you meant by that what a man could see in a balance sheet of tangible assets? [119]

The Witness: Assets and liabilities of the corporations, yes.

(Testimony of Ralph W. Moore.)

Mr. Walker: That is all. No further questions.

The Court: Anything further?

Recross-Examination

By Mr. Maiden:

Q. You, of course, Mr. Moore, had no intention of misleading the Government in your letter in answer to their inquiry?

A. Oh, absolutely none. I never have.

Q. You meant to tell the Government in that letter that in your opinion, a claim that the stock was worthless in 1939 and could be charged off as a loss was well based in fact?

A. I perhaps didn't understand the letter clearly. I didn't consider the question of charging it off was—was that in the letter?

Q. Yes, that is in the letter, to tell that the stockholders are claiming that certain of these taxpayers—the stockholders were claiming that it was worthless in 1939.

A. And that they proposed to charge it off in 1939?

The Court: Look at the letter, Mr. Witness, and satisfy yourself about that.

The Witness: Well, I fail to see anything in the letter that says anything about charging it off.

By Mr. Maiden:

Q. Well, it simply says that certain stockholders have claimed that the stock of this company became worthless in 1939. It is requested that you furnish

(Testimony of Ralph W. Moore.)

information covering any event which, in your opinion, rendered the stock worthless.

A. Yes. Well, perhaps that was what they had in mind, but I didn't—

Q. It wasn't your intention in answer to this letter to mislead the Government? I mean, you really meant when you put in this letter that the stock was actually worthless?

Mr. Walker: I object to that.

Mr. Maiden: I mean practically worthless?

The Court: The objection?

Mr. Walker: I object to him trying to rephrase what the witness said. Let the letter speak for itself insofar as what he said there.

The Court: Well, counsel has changed his language from—

Mr. Maiden: "Actually," to "practically," which was a slip of the tongue.

The Court: And you mean practically?

Mr. Maiden: Yes, sir. Practically. I thought I changed it.

The Court: Read the question, Mr. Reporter, with [121] the word, "practically," in instead of, "actually."

(The question was read.)

The Court: Now, there is no objection to that question?

Mr. Walker: No objection.

The Court: Very well, you may answer.

(Testimony of Ralph W. Moore.)

The Witness: Well, my answer would be—I thought I answered once—based on the balance sheet of the corporation, considering its assets and its liabilities. I considered the stock practically worthless, yes.

By Mr. Maiden:

Q. Did you understand what the Government was asking you this information for?

A. No, frankly, I did not.

Q. You didn't understand that at that time?

A. No, I didn't understand that somebody was going to write the stock off.

Q. You didn't understand that?

A. No, I didn't understand that.

The Court: Anything further from this witness?

Mr. Maiden: Nothing further if the Court please.

The Court: Anything further?

Mr. Walker: Nothing further.

The Court: You may stand aside, Mr. Witness.

(Witness excused.) [122]

The Court: Call your next.

Mr. Maiden: Your Honor, could we have a little recess?

The Court: We will suspend for five minutes.

(Short recess taken.)

The Court: Are you ready to resume, gentlemen?

Mr. Maiden: Yes.

Mr. Walker: Yes.

The Court: Call your next.

Mr. Walker: Mr. Woodard.

Whereupon,

GEORGE C. WOODARD

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: George C. Woodard.

By Mr. Walker:

Q. Mr. Woodard, what is your present employment?

A. Vice-president and director of Ryan Aeronautical Company of San Diego.

Q. How long have you been so employed?

A. Since the first of January, 1942.

Q. What were you doing prior to that time?

A. I was treasurer and director of G. Brashears & Company. [123]

Q. Were you connected with any other corporations at that time, prior to the time you left for San Diego?

A. As a representative of G. Brashears & Company I was officer and director in several other corporations, in which they were interested.

Q. Were you ever a director or connected with Capital Service?

A. Yes, I was treasurer and a director of Capital Service from its incorporation until the date I left Brashears.

Q. Were you ever an officer or director of Central California Utilities?

(Testimony of George C. Woodard.)

A. I think I was a treasurer and director of Central California Utilities.

Q. As an officer of Capital Service, Inc., did you have occasion to be familiar with its negotiations of a business nature?

A. I was connected with every operation in which they engaged.

Q. Do you recall whether Capital Service ever loaned any money to Central California Utilities?

A. Yes, they did make them a loan.

Q. Do you recall when and how much?

Mr. Maiden: Your Honor, that is all set out in the stipulation. [124]

Mr. Walker: I am just getting before the Court the connection between this witness and the operations here.

The Court: Very well. It isn't necessary, however, to interrogate the witness on matters in the stipulation unless you want to lay a foundation for something else.

Mr. Walker: Well, I want to bring in his knowledge of the proposition. May I have the stipulation, please?

By Mr. Walker:

Q. I show you, Mr. Woodard, what has been stipulated as Joint Exhibit 8-H, being a copy from the general ledger page of the books of Capital Service, and ask you if you recognize that?

A. Yes, I do.

Q. In whose handwriting are those entries made?

(Testimony of George C. Woodard.)

A. With the exception of two notations, it is all in mine—with the exception of three items it is all in my handwriting.

Q. What are those three items?

A. The last item, “charge off to P & L,” and two notations above that: “Settlement of Shell Oil,” with a question mark after it and, “sale of pipe,” on the following entry.

Q. Except for those three entries, all the others are in your handwriting?

A. Yes, sir. That is correct.

Q. The document shows that on September 16, 1936, a [125] \$20,000.00 item was entered identified as a loan on notes. Are you familiar with that entry and what it represented?

A. Yes.

Q. What?

A. Capital Service lent Central California Utilities \$20,000.00.

Q. Do you know the purpose of that loan?

A. The purpose of the loan was to enable Central California and its subsidiaries to pay off some of the obligations of its predecessor, and, roughly, as I recall it, about a third of it was for that purpose and the balance was to make improvements in their facilities.

Q. Did you know anything of the nature of the business of Central California Utilities, when this money was advanced?

A. Yes. The deal was discussed among the directors of Brashears & Company and all the directors

(Testimony of George C. Woodard.)

of Brashears and of Capital Service were acquainted with the business of Central and its subsidiaries.

Q. Did you feel that you were in possession of sufficient information regarding the Central California Utilities' project to justify you in passing upon the wisdom of that advance?

A. Yes, I did.

Q. Did you feel it was a sound move? [126]

Mr. Maiden: I object to that as being leading. I hate to make this kind of objection, your Honor, but his questions put the answers in the witness' mouth.

Mr. Walker: Well, I will rephrase the question. By Mr. Walker:

Q. Upon what basis was the loan made? The stipulation shows in the exhibit that it was a loan on a note. Can you state anything further with reference to the terms upon which the advance was made?

A. The advance was made for the purpose of putting the project in such a shape as would enable it later to be publicly financed.

Q. Did you feel that you could have obtained repayment of that note at any time? A. No.

Q. Did you have that opinion when you advanced the money?

A. No, I could—we could only have obtained repayment if we were successful in carrying it through to the end which we had in view at the start.

(Testimony of George C. Woodard.)

Q. And what was that end?

A. To further develop the properties and engage in public financing.

Q. Did you know what the physical assets of Central California Utilities were? [127]

A. In general, yes.

Q. Did you feel that they were sufficient to back up a loan of this kind?

A. No, they were very insignificant.

Q. Do you know any other terms upon which that advance was made? In other words, what was the position of Capital Service to be with reference to the creditor?

A. I don't understand the question.

Q. Well, did Capital Service own any stock in Central California Utilities?

A. Yes. They received escrow stock which represented, roughly, the relation of 250,000 to some 312 of common stock, and with the 250,000—Mr. Moore as a co-venture with Capital Service got 25 per cent of the 250,000.

Q. Was that arranged prior to the time of the loan? A. Yes, concurrently with the loan.

Q. Concurrently with the loan? A. Yes.

Q. Do you know whether the \$20,000.00 which was advanced in 1936 was spent for the purpose you stated it was obtained for?

A. Approximately so, yes.

Q. Could you state again the purposes for which it was obtained?

(Testimony of George C. Woodard.)

A. To pay off the remaining obligations of its predecessor [128] and for improvement of the existing facilities.

Q. Did you expect the operations of Central California Utilities as they existed in 1936 to be such as would make it possible for the loan to be repaid?

Mr. Maiden: If your Honor please, I object to that as leading. I am sorry.

The Court: The objection is sustained. The question is propounded in an improper way.

By Mr. Walker:

Q. Did you know the extent of the operations of the Central California Utilities when you advanced the money? A. Yes, we did.

Q. What was the extent of those operations?

The Court: That is better.

The Witness: Very minor.

By Mr. Walker:

Q. Can you elaborate on that? What do you mean by, "very minor"?

A. Well, they had only a small distributing system with some 10 to 12 consumers, and it would have been impossible for a system of that size to make enough money to even pay interest on the loan.

Q. Do you know whether the money that was expended to extend the lines and recondition the wells was effective for bringing in additional wells? [129]

Mr. Maiden: Your Honor, I am going to object to that again.

(Testimony of George C. Woodard.)

The Court: That calls for a yes or no answer. It would not justify the witness to go ahead.

Mr. Maiden: It calls for a yes or no answer.

The Court: It would not justify the witness to go beyond yes or no. The objection is overruled, you understand, so far as the question is concerned.

Mr. Walker: I will phrase a different question anyway, if the Court please.

By Mr. Walker:

Q. Do you know the results of the expenditure of the money? Just answer yes or no.

A. Yes.

Q. What results were obtained?

A. Very temporary improvement and ultimately negligible results.

Q. What do you mean by "temporary improvement"?

A. Well, they brought in a few wells that produced for a short time.

Q. What happened to those wells?

A. They eventually either became water wells, or for some other hazard, through some other hazard became inoperative, non-producing.

Q. Did Capital Service put forth any additional money [130] besides this \$20,000.00?

A. Subsequent to the expenditure of the \$20,000.00 Capital Service continued to advance money in small amounts to twelve, fourteen, fifteen thousand dollars additional.

Q. What were those additional advances for?

(Testimony of George C. Woodard.)

A. Part of it was to try and bring in and drill another well; part of it was to defray expenses of the corporation of various kinds at various times.

Q. You have stated that the physical assets of the corporation when the money was advanced were practically negligible. What happened to those assets, to your knowledge?

A. The wells became non-producing. The leases were eventually abandoned because the company couldn't continue to pay the monthly minimum royalties.

Q. What about the pipe line?

A. The pipe line, due to the flood, became in such shape that it was necessary to either repair it or remove it, and it was removed; sold and removed.

Q. Did Central California Utilities ever approach Capital Service for additional funds?

A. Yes, several times.

Q. Do you recall when that was?

A. I would say several times each year during the entire period.

Q. After 1937 were any such funds advanced?

A. If any were advanced after '37, it was very minor amounts, to my recollection.

Q. Why were no further funds advanced?

A. Capital Service didn't have the funds.

Q. Didn't have any money at all?

A. It had some money. It had other enterprises in which it had this money tied up.

Q. What other enterprises were those?

(Testimony of George C. Woodard.)

A. Timm Aircraft Company, and the other enterprise started out as Full-Ton Truck Company and ended up as a baking company.

Q. You say those other projects took money of Capital Service?

A. Yes, that is correct.

Q. Why were those other projects favored over Central California Utilities?

A. I would have to refresh my memory. As I recall it, the investment was made in all three of them. The original investment, which took most of Capital Service money was made in the same year, and there wasn't a whole lot more money advanced to any of them after 1937.

Q. What was your opinion, with reference to the next step to be taken by Central California Utilities in its project?

A. To obtain additional finances. [132]

Q. It needed more money? A. Yes.

Q. What did it expect to do with that additional amount of money?

A. Arrange for a gas supply by either drilling wells or buying gas, extending the distributing lines.

Q. Was that not the same job that it had to do in 1936? A. Exactly.

Q. Did Capital Service expect to put additional money into Central California Utilities? I mean after 1937. A. Yes, if they could get it.

Q. How long did they have those expectations?

(Testimony of George C. Woodard.)

A. They still expected it when I left at the end of 1941.

Q. Capital Service, then, at the end of 1941 expected to put its own money into this project of Central California Utilities?

A. If they could get the money, yes.

Q. If they could get it. Was there any other way in which Capital Service expected to utilize its position with Central Utilities other than putting up its own money?

A. Yes. It considered—it negotiated several times, trying to sell the project to other people.

Q. Upon what terms did it try to make such sales? [133]

A. Basically upon any terms upon which it could recover its entire advance.

Q. Do you know of any such negotiations that were made? A. Offhand, I can recall two.

Q. What were they?

A. One with Mr. Elder and other—another gentleman, and one with Mr. Dechter.

Q. Do you recall when the Elder negotiations took place? A. Oh, '37, '38.

Q. Do you recall when the Dechter negotiations took place? A. Oh, '40 or '41.

Q. I would like to show you a copy of Petitioner's Exhibit No. 28. Who was Mr. Dechter?

A. He was an attorney who had a large number of clients who were in the oil business or allied to the oil business.

(Testimony of George C. Woodard.)

Q. Now, where was he located?

A. The Subway Terminal Building.

Q. Do you know where he is now?

A. He died some two or three years ago.

Q. How long had you known him?

A. As of 1941 about eight years.

Q. Had you talked to him or had you spoken to him at all about the Central California Utilities project? [134]

A. Yes, several times.

Q. You say that in 1940 or 1941, you had a discussion with him about it?

A. Yes, we did.

Q. What was the essence of that discussion?

A. That he had a client who he thought would be interested in the venture and asked me all the details and the status of the project, so that he could present it to him.

Q. What did you do about it then?

A. I asked Mr. Moore to get all the facts together and draw up a letter and send it to Mr. Dechter.

Q. Do you know if Mr. Moore ever wrote such a letter?

A. Yes, he showed it to me.

Q. I show you Petitioner's Exhibit No. 28 and ask you if that is the letter?

A. Well, without reading it in detail, I couldn't swear it is exactly the same, but apparently that is the letter.

Q. Do you remember receiving a copy of it yourself?

(Testimony of George C. Woodard.)

A. No, I don't recall that. That was Mr. Moore's practice.

Q. Did you ever contact Mr. Dechter after March of 1941? A. Yes, I did.

Q. Did you speak to him further about the Central California Utilities Project? [135]

A. Yes, I did.

Q. What was the nature of those discussions?

A. He asked for a little more information at one time, and later he told me that his client had decided he was not interested.

Q. Mr. Woodard, do you recall any correspondence being received by the Central California Utilities Corporation from the Railroad Commission?

A. Yes, we received several communications from them.

Mr. Maiden: In order to save time, if the Court please, I will stipulate that the documents Mr. Walker has in his hands are true copies written by the Railroad-Public Utilities Commission to the Central California Utilities Corporation. I believe they are all to those.

Mr. Walker: They are all addressed that way, and there are some replies which are in there, too.

Mr. Maiden: There are some replies, and I agree that they may go in evidence.

Mr. Walker: May we have these introduced into evidence as Petitioner's successive exhibits for each letter? Is that the best way to do that?

(Testimony of George C. Woodard.)

Mr. Maiden: That is all right, or they can all go in as one exhibit.

Mr. Walker: Well, I think we have separate copies there. It would be easier to keep them as separate exhibits. [136]

Mr. Maiden: All right.

The Court: Very well. They will be received in evidence as Exhibits Nos. 30 to 37, inclusive.

(The documents above referred to were received in evidence and marked Petitioner's Exhibits Nos. 30 to 37, inclusive.)

PETITIONER'S EXHIBIT NO. 30

(Copy)

Los Angeles, Calif.,

October 11, 1937.

File: 60-2

Central California Utilities Corporation,
508 Security Bldg.

Los Angeles, Calif.

Attention: Mr. W. Martin Lathrop,
Vice-President.

Dear Sirs:

Under date of July 21st we received a letter from you stating that you had entered into an agreement with the Southern California Gas Company for a temporary supply of gas due to the difficulties you were having with your wells.

(Testimony of George C. Woodard.)

At the time this matter was discussed with Mr. Crenshaw, you were requested to submit a complete report as to the outage and as to when you expected to have the wells back on the line again.

In view of the fact that we are now entering into the winter season, and it may be necessary to curtail gas supplies for firm gas users, we would be pleased to have you submit a detailed report advising us as to the status of the supply of gas in your territory.

Trusting we may have this at your convenience, we are,

Yours very truly,

RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA,

By

Representative for Southern
California.

Admitted: May 5, 1948 T.C.U.S.

(Testimony of George C. Woodard.)

PETITIONER'S EXHIBIT NO. 31

(Copy)

Los Angeles, Calif.,

November 1, 1937.

File: 60-2

Central California Utilities Corporation,

508 Security Bldg.,

Los Angeles, Calif.

Attention: Mr. W. Martin Lathrop,
Vice-President.

Dear Sirs:

Under date of October 11th we wrote you requesting that you submit a complete report of the outage which occurred in your system some time ago due to your wells caving in.

Since the contract with the Southern California Gas Company under which you are now operating is only temporary, we would request that this report be submitted to us immediately, advising us when the wells will be in operation and gas service be resumed, thereby cancelling the present contract.

Trusting this matter will be given your prompt attention, we are,

Yours very truly,

RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA,

By

Representative for Southern
California.

Admitted May 5, 1948, T.C.U.S.

(Testimony of George C. Woodard.)

PETITIONER'S EXHIBIT No. 32

October 15, 1941

Application No. 21581

Central California Utilities Corporation

508 Security Building,

Los Angeles, California

Attention: Mr. R. W. Moore, President

Gentlemen:

Under date of March 25th you wrote us in reply to our letter of March 18th as to the possible resumption of gas service by the Gas Fuel Service Company in the vicinity of Hanford and Stratford, California.

In your letter you stated that at that time you were negotiating with certain interests looking forward to the possible resumption of service by the Gas Fuel Service Company. You further stated that these negotiations were progressing as rapidly as possible and that you expected within a short time to be able to submit some definite information relative to the resumption of gas service by this company.

Since we have not heard from you to date, we would be pleased to have you advise us of the present status of this matter.

(Testimony of George C. Woodard.)

Trusting this will be given your prompt attention,
we are,

Yours very truly,

RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA,

By WILLIAM H. GORMAN,

Director, Southern District.

Admitted May 5, 1948, T.C.U.S.

PETITIONER'S EXHIBIT No. 33

(Copy)

Los Angeles,

December 2, 1941

Application No. 21581

Central California Utilities Corporation

508 Security Building

Los Angeles, California

Attention: Mr. R. W. Moore, President

Gentlemen:

Under date of October 15th we wrote you requesting that you advise us as to the status of the Gas Fuel Service Company in the vicinity of Hanford and Stratford, California, relative to the possibility of resumption of gas service in that area.

Up to the present time we have not received a reply and would be pleased to have you advise us as

(Testimony of George C. Woodard.)

soon as possible as to your future plans regarding this Company.

Yours very truly,

RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA,

By WILLIAM H. GORMAN,

Director, Southern District.

CEC:HCB

Admitted May 5, 1948, T.C.U.S.

PETITIONER'S EXHIBIT No. 34

(Copy)

Los Angeles,

February 3, 1942.

Application No. 21581

Central California Utilities Corporation

508 Security Building

Los Angeles, California

Attention: Mr. R. W. Moore, President

Dear Sirs:

Under dates of October 15th and December 2d, 1941, respectively, we wrote you requesting that you advise us as to the status of the Gas Fuel Service Company, which formerly operated the gas distribution system in the vicinity of Hanford and Stratford, California, with reference to the possibility of the resumption of gas service in that area.

(Testimony of George C. Woodard.)

On March 25, 1941, you advised us that there might be a possibility of the Gas Fuel Service Company resuming service and as soon as negotiations had been completed you would notify us further regarding the matter. Up to the present time we have heard nothing further from you and would be pleased to have you advise us as soon as possible as to your future plans regarding this company.

Yours very truly,

RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA,

By WILLIAM H. GORMAN,

Director, Southern District.

CEC:HCB

Admitted May 5, 1948, T.C.U.S.

PETITIONER'S EXHIBIT No. 35

(Copy)

Los Angeles,

March 16, 1942.

Application 21581

Central California Utilities Corporation
508 Security Building
Los Angeles, California

Attention: Mr. R. W. Moore, President

Dear Sirs:

Under date of October 15, 1941, we wrote you

(Testimony of George C. Woodard.)

requesting that you advise us as to the status of the Gas Fuel Service Company, with reference to resumption of service by that Company in the vicinity of Hanford and Stratford, California.

Up to the present time we have not received a reply and would be pleased to have you advise us regarding this matter as promptly as possible.

Yours very truly,

RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA,

By WILLIAM H. GORMAN,

Director, Southern District.

Admitted May 5, 1948, T.C.U.S.

PETITIONER'S EXHIBIT No. 36

(Copy)

Los Angeles,

May 22, 1942.

Application 21581

Central California Utilities Corporation
508 Security Building
Los Angeles, California

Attention: Mr. R. W. Moore, President

Gentlemen:

We have written you a number of times subsequent to October 15, 1941, requesting that you advise us as to the status of the Gas Fuel Service

(Testimony of George C. Woodard.)

Company, with reference to resumption of service by that Company in the vicinity of Hanford and Stratford, California. Up to the present time we have not received a reply.

Please give this matter your prompt attention and advise us immediately.

Yours very truly,

RAILROAD COMMISSION OF THE STATE
OF CALIFORNIA,

By WILLIAM H. GORMAN,
Director, Southern District.

Admitted May 5, 1948, T.C.U.S.

PETITIONER'S EXHIBIT No. 37.

(Copy)

June 9, 1942.

Railroad Commission
State of California
708 State Building
Los Angeles, Calif.

Attention: Mr. William H. Gorman

Gentlemen:

Re: Application 21581

Replying to your recent letter requesting status of Gas Fuel Service Company with reference to resumption of service in the vicinity of Hanford

(Testimony of George C. Woodard.)

and Stratford, California, we wish to advise that the Gas Fuel Service Company is no longer operating, having been inactive for the past three years.

Very truly yours,

GAS FUEL SERVICE

COMPANY,

F. E. DENT.

FED:BB

Admitted May 5, 1948, T.C.U.S.

By Mr. Walker:

Q. Mr. Woodard, do you recall having received telephone calls from the Railroad Commission?

A. No, I don't.

Q. Did you ever speak to anyone on the telephone in the Railroad Commission?

A. Not that I remember.

Q. You stated that Capital Service had no money to put into the California Utilities project after 1937. What was your thought with reference to the effect on the project of not supplying any additional money?

Mr. Maiden: Your Honor, I don't think his thought is competent evidence.

(Testimony of George C. Woodard.)

The Court: Are you objecting?

Mr. Maiden: I am objecting, if the Court please.

The Court: Objection sustained.

By Mr. Walker:

Q. Would you have been willing to advance any more money if you had it to advance? [137]

Mr. Maiden: Now, your Honor, I object to that too.

The Court: Objection sustained to the form of the question.

By Mr. Walker:

Q. Mr. Woodard, in making representations to Mr. Dechter with reference to disposing of the project, what did you say to him as to your thought of why the project was a good one?

Mr. Maiden: Just a moment, Mr. Woodard. I am going to object to that upon the ground it would be a self-serving declaration just as clear as it could be, and certain other statements made by this witness in that connection would just be self-serving declarations, and it calls for conclusions of the witness, too.

The Court: The objection is sustained. It is up to the Court to get the facts and not have the witness, who is not an expert, express an opinion.

By Mr. Walker:

Q. Do you know, Mr. Woodard what the physical assets of the company were in 1937?

A. As I recall it, they were about the same——

(Testimony of George C. Woodard.)

The Court: Just a moment. That calls for a yes or no answer. Do you know?

The Witness: Yes.

The Court: May I suggest to you, Mr. Witness, if you [138] will try to pay attention to the question propounded and direct your answer to that question, it might assist us in getting along a little better.

The Witness: O.K.

The Court: Now read the question again, Mr. Reporter.

(The question was read.)

The Witness: Approximately yes.

By Mr. Walker:

Q. What were they?

A. Certain leases, pipe line.

Q. Do you know what the assets were in 1938?

A. I haven't quite finished on the '37.

Q. Oh, I am sorry.

A. And the certificate of necessity.

Q. When you say, "certificate of necessity," you mean this certificate by the Railroad Commission?

A. Yes.

Q. Referred to as a certificate of public convenience and necessity? A. That is right.

Q. How did Capital Service stand to gain by putting its money into this project?

Mr. Maiden: Your Honor, I object to that upon the ground it calls for a conclusion of the witness upon questions [139] solely within the province of this Court to determine from the facts of the case.

(Testimony of George C. Woodard.)

Mr. Walker: If the Court please, the witness has already stated that Capital Service expected to put its own money into this project in addition.

The Court: I will overrule that objection and let the witness answer.

The Witness: May I hear the question?

The Court: If it does develop purely into a matter of opinion, it would not have any weight as evidence and would be given no consideration in the determination of this case for the reason that the facts are to be determined by the Court, and that an expression of a witness who is not an expert would be invading the province of the Court. You may answer.

The Witness: May I hear the question again, please?

(The question was read.)

The Witness: The question isn't clear to me.

By Mr. Walker:

Q. In 1937 you have stated that Capital Service had supplied some \$14,000.00 on top of the \$20,000.00 it had already advanced. You have also stated that Capital Service was willing to put in additional money if it had it after 1937. My question was, how did Capital Service expect to gain from the advance of additional moneys? [140]

A. Through making the stock that it owned in Central Cal. have value.

Q. How did it propose to do that?

(Testimony of George C. Woodard.)

A. By building up the small distributing system and then through further enlarging it by means of public financing.

Q. What expectations did Capital Service have of doing that after the pipe line had been sold?

Mr. Maiden: If the Court please, I object to that now. That is calling for a conclusion of this witness upon a very crucial point of this case to be decided solely upon the facts.

Mr. Walker: If the Court please, I think the Court is entitled to know what the plans of these people were.

Mr. Maiden: Well now, I think the facts don't show that.

The Court: The question is not confined to the plans. You are asking him what they expected to reap or gain by these proceedings. That could only be an expression of opinion.

Mr. Walker: Well, I will confine my question then to what their plans were.

The Court: That would be all right. There would be no objections to a question of that kind.

Mr. Walker: All right. [141]

By Mr. Walker:

Q. What plans did Capital Service have after 1937 with reference to the Central California Utilities project?

A. During a period after the flood it was impossible to—it was recognized as impossible to do anything until after the flood had been drained off.

(Testimony of George C. Woodard.)

The directors then thought that when that occurred, that if additional money could be raised, we were in approximately the same position as we were when we started.

Q. Then its plans after the flood had been drained—can you explain what they were? What did you have to do?

A. We would have to obtain additional money for the pipe lines and additional production of gas.

Q. How long did you have those plans?

A. Constantly during the entire period.

Q. When did you abandon those plans?

A. They were still existent when I left the company.

Q. Did you have any plans that looked to the accomplishment of those results, other than through the expenditure of your own money?

A. No, not to the accomplishment of the plan. We considered the sale of the project as a whole to get our money back and to get out of it.

The Court: Has counsel finished?

Mr. Walker: No, I would like to ask the witness one [142] more question.

By Mr. Walker:

Q. After the pipe lines had been destroyed or washed out and sold did that affect your plans for developing the project?

A. Not to any great extent.

Q. Why?

(Testimony of George C. Woodard.)

A. Because we still had the franchise and the gas was still in the district.

Q. What is the significance of that?

A. It only took some money to set up another pilot line as a sample to portray the picture whereby additional money could be obtained from the public.

Mr. Walker: No further questions.

Cross-Examination

By Mr. Maiden:

Q. Mr. Woodard, as treasurer and director of the Capital Service Corporation, Petitioner in this case, what were your duties?

A. I handled all of their bookkeeping transactions, financial transactions, and watched after the activities in which their projects were engaged.

Q. Well, yours was an indoor job, isn't that right, in the offices of these corporations?

A. No, sir, not entirely. [143]

Q. Were you in charge of production in any of these corporations? A. At the bakery, yes.

Q. Well, I am not talking about the bakery. I am talking about the Capital Service, Inc. and the Central California Utilities, and the Gas Fuel Oil Company.

A. I was not in charge of that, no.

Q. Well now, just what duties did you perform for those three corporations up until the time you left? A. Central California?

Q. That is right.

(Testimony of George C. Woodard.)

A. Only in an advisory capacity as to their operations in the office of G. Brashears & Company, where the books and records of Central Cal. were kept.

Q. Now, isn't it a fact that you spent practically all of your time in the offices of G. Brashears & Company? A. No, sir.

Q. Well, you were bookkeeper weren't you?

A. Well, you might call me that.

Q. Well, where did you keep books?

A. Are you speaking of the books of the Capital Service Company? Q. That is right.

A. I kept them in the office of the G. Brashears & Company, yes. [144]

Q. Well, did you keep G. Brashears & Company's books? A. No, sir.

Q. Did you have anything to do with keeping their books?

A. Yes, I was in charge of the entire cage and accounting department of G. Brashears.

Q. In addition to that you were in charge of the books of Capital Service? A. Yes, sir.

Q. In addition to that you were in charge of the books of Central California Utilities?

A. No, sir.

Q. You were not? Now, did you ever go into the field in Fresno and Kings Counties and go over these gas lines? A. Once.

Q. When was that?

A. I couldn't recall the exact date. 1936 or '37.

(Testimony of George C. Woodard.)

Q. Did you go out there with someone?

A. Mr. Brashears.

Q. What was the purpose of that? Was it to look over the equipment they had in connection with Mr. Brashears becoming interested in this venture?

A. No, that was after we were in it.

Q. That was after what?

A. After we had entered the project. [145]

Q. After you had entered the project?

A. Yes.

Q. Prior to entering the project you never had been out there? A. No.

Q. Had Mr. Brashears ever been out there to your knowledge prior to the acquisition?

A. He told me he was.

Q. Well now, Mr. Woodard, isn't it a fact that in 1939 the Gas Fuel Service Company had 31 miles of pipe gas line and meters?

A. Mr. Moore so informed me.

Q. But you don't know of your own fact.

A. I don't know whether they had one mile or 15 or 30. I never counted it.

Q. And today is the first time you heard about how much they had, is that right? A. No.

Q. Well then, I am going to ask you, what of your own knowledge—not what you heard Mr. Moore testify to today—what, of your own knowledge, physical assets did the Gas Fuel Company have in 1936 at the time G. Brashears & Company became interested in this proposition?

(Testimony of George C. Woodard.)

A. A very small distribution setup, some ten to twelve consumers, one producing well, a lease and a certificate of [146] public necessity and convenience.

Q. Now, you didn't know how much pipe line they had? A. I don't recall that I knew, no.

Q. You didn't know anything about the conditions of the pipe line either?

A. Only that I was told it wasn't in very good shape.

Q. When were you told that?

A. At the time we were talking about entering the deal.

Q. Well, didn't someone suggest that you all go out there and look over and see just how bad a shape it was in?

A. No one suggested that I go.

Q. Well, didn't it occur to you that probably you ought to make an investigation to see what it was you were buying?

A. Two directors of Brashears & Company had already gone over the ground.

Q. Well, so far as being a director was concerned, were you just really a dummy director?

A. You might ask Mr. Brashears.

Q. Did you own any stock in G. Brashears & Company? A. Yes, I did.

Q. How much?

A. I think it was 10 shares of preferred and 50 shares of common.

(Testimony of George C. Woodard.)

Q. Do you know how many shares of stock they had outstanding? [147]

A. Oh, roughly, from memory, I would say 1500 shares of eight per cent preferred; 700 shares of seven per cent and about 2100 shares of common.

Q. Did Mr. Brashears—was he a majority stockholder? A. No, he was not.

Q. Who was the majority stockholder?

A. Dr. Haigh was the largest stockholder, but he was not a majority stockholder.

Q. Did Mr. Brashears have a good sized holding of stock in the Brashears Company?

A. You mean in proportion to the total?

Q. Yes. What percentage would you say he had.

Mr. Walker: May I ask counsel what the purpose of these questions is.

Mr. Maiden: Well, I am just trying to find out whether or not he was just a dummy director on these corporations, or whether or not he really served any function other than just being a yes man and drawing up the minutes.

Mr. Walker: Well, Mr. Brashears is in the court room.

Mr. Maiden: Well, I am talking to Mr. Woodard.

Mr. Walker: Well, ask him——

Mr. Maiden: I am doing the examination, Mr. Walker.

The Witness: May I hear your question again?

Mr. Maiden: I will rephrase the question.

(Testimony of George C. Woodard.)

By Mr. Maiden:

Q. I just simply asked you if you know. If you don't you can say so. Do you know approximately what percentage of stock Mr. Brashears held in G. Brashears & Company?

A. Roughly, 10, possibly 12.

Q. Per cent? A. Yes.

Q. Did any of the other members of his family own any stock in that?

A. At one time his mother owned some, I think, 50 shares of preferred, which at her death he acquired.

Q. Now, in Capital Services, Inc., that is the Petitioner in this case, did you own any stock in 1936 in that corporation? A. No, sir.

Q. You didn't own any stock in that Central California Utilities? A. No, sir.

Q. Yet, I believe you stated you were treasurer and director of each of those three corporations; G. Brashears & Company, Capital Services and Central California Utilities?

A. I stated that I was a representative of G. Brashears & Company.

Q. Now, is it a fact that you kept the minutes of the [149] board of directors? A. No, sir.

Q. You did not? A. No, sir.

Q. Now, Mr. Woodard, what did you know about investments from the standpoint of an underwriter of an investment banker in properties such as we have involved here in 1936?

(Testimony of George C. Woodard.)

A. Well, one of my principal functions at Bra-shears & Company was to investigate each project in which they decided to invest money, loan money, or underwrite the securities.

Q. Now, what personal knowledge did you have—I say personal knowledge, now, Mr. Woodard, of the type of industry that this Petitioner was in up in Kings County, in 1936, and in 1937 and in 1938?

A. You said the Petitioner?

Q. That is right, the Capital Service, Inc. You say you were a director of it?

A. Yes, sir. They were not engaged in any enterprise in Fresno County or in Kings County. They are a creditor and a stockholder of a corporation who was.

Q. I am asking you what knowledge you have of the physical facts and circumstances existing with respect to the business of the Gas Fuel Oil Company in Kings County in 1936, 1937, 1938, 1939 or 1940? [150]

A. I only saw the property once, went over the territory; saw them once.

Q. That was back in 1936?

A. I can't recall the exact date; I think it was a little later than that, '37.

Q. In 1936 at the time your company became interested and at the time this petitioner became interested in this project, you did know that they had physical assets of pipe line already laid out and customers?

(Testimony of George C. Woodard.)

A. I was so informed by Mr. Moore and two directors of Brashears & Company.

Q. But you had no knowledge of that?

A. No, sir.

Q. You knew that the Kettleman-Lakeview Oil Company had some oil wells and leases in 1936, didn't you?

A. By the same means which I knew they had the other assets.

Q. You had no personal knowledge of that?

A. No, sir.

Q. You knew, didn't you, that there was an ample market for gas in Kings and Fresno Counties in 1936 at the time these companies became interested in this project, didn't you?

A. I believed that there was.

Q. Upon what belief was that based?

A. The population, number of farms, and the fact that [151] electricity was much more costly than gas for pumping purposes.

Q. Now, did you make a personal investigation of that, or did you get that from somebody else telling you about it?

A. I made no investigation.

Q. Well then, where did you learn those facts?

A. I obtained the gas and electric rates from Ralph Moore. I had been through Fresno and Kings Counties and was somewhat familiar with the farming activities in those areas.

Q. So that you really have no personal knowledge about the market and the demand for gas and

(Testimony of George C. Woodard.)

the availability of gas in 1936, 1937, 1938, 1939 or 1940 or any other time? Isn't that right?

A. May I hear that question again?

Mr. Maiden: Would you repeat the question, please?

(The question was read.)

Mr. Maiden: I am speaking about your personal knowledge now.

The Witness: No, had no personal absolute knowledge.

By Mr. Maiden:

Q. Now, I believe you stated that Capital Service, Inc., didn't have any money after 1937. Is that right? A. Yes, sir.

Q. And that that was the reason why they didn't advance more money to this corporation thereafter, is that right? [152]

A. I believe I so testified.

Q. Now, isn't it a fact that the Capital Service, Inc., made other investments in other businesses after it had made investments in the California Central Utilities Corporation?

A. My recollection of the three investments they made were made almost simultaneously in the same year.

Q. What were those three investments outside of—we can leave one of these out.

A. The Full-Ton Trucks and the Timm Aircraft Company.

(Testimony of George C. Woodard.)

Q. The Full-Ton Truck and the Timm Aircraft Company? A. That is right.

Q. Now, you state positively that they are the only three investments that Capital Service Company made in 1936 on through 1942?

A. No, they made minor investments subsequent to that as an outgrowth of the Full-Ton Truck Company.

Q. Well, now, just what do you mean by "minor investments"? State the nature of the investments.

A. They made advances to the bakery as a result of having——

Q. They made advances to who?

A. To the bakery, which was an outgrowth of the Full-Ton Truck deal.

Q. Now, when did they make the advancements to the bakery? [153]

A. I couldn't recall from memory. I think it was through '37, '38, and '39.

Q. When did this corporation, the Petitioner become interested in this bakery?

A. '37 or '38 I would say. I am not positive on the exact date.

Q. To what extent and how did they become interested in this bakery?

A. I couldn't recall the exact amount.

Q. Well, was it in a minor role or a major role?

A. It was a moderate amount compared to the total net worth of Capital Service.

Q. When was A & B Bakery incorporated?

(Testimony of George C. Woodard.)

A. About 1939. I think it was A & W.

Q. Well, is A & W one of the—is it the subsidiary corporation involved in the consolidated returns in this case? I believe the name of this one is A & W.

Mr. Walker: If the Court please, I think maybe I could help counsel a little bit here and speak to him off the record again.

Mr. Maiden: No, I would just rather go right ahead and develop it.

Mr. Walker: All right.

The Witness: Not having seen the consolidated returns, I wouldn't be able to answer. [154]

By Mr. Maiden:

Q. Well, I can show it to you in a hurry. Now, you had an A & B—A & W Bakery, is that right?

A. Yes, sir, it is. It is right.

Q. It is the A & W Bakery?

A. Yes, sir.

Q. That is in the consolidated return?

A. It says, "A & W."

Q. Now then, they had another bakery, named, "A & B"? A. Not to my knowledge.

Q. That is the only bakery they had?

A. That is the only one I knew anything about.

Q. Well, did you know everything that was going on in respect to the business of the Capital Service, Incorporated, while you were acting as the treasurer and director? A. Yes, sir.

Q. But you didn't know anything about their activities prior to that time?

(Testimony of George C. Woodard.)

A. Prior to what time?

Q. Prior to the time you became a director and treasurer, 1936, wasn't it?

A. Capital Service, that was at the inception of the company in 1936.

Q. Now, we have got the bakery, and you say that the bakery was incorporated in 1939, is that right? [155]

A. That is my recollection. I might not be exactly accurate on that date.

Q. Well, would it be before 1939, if you were not accurate, or after 1939?

A. I wouldn't be able to answer that question.

Q. You wouldn't be able to answer that?

A. The records will show.

Q. Did you ever hear of a Mr. E. B. Christopher? A. I don't recall.

Q. Do you know whether or not Capital Service ever had any investment in connection with E. B. Christopher?

A. It sounds—I believe that was a pilot who we made a loan to, if I am correct on the name.

Q. Well now, the Timm Aircraft Corporation, when was that incorporated? A. About 1935.

Q. About 1935. Did the Capital Service, Inc., become an investor in that corporation after its incorporation in 1935?

A. Approximately that time, '36. I forget the exact date.

Q. Well, could it have been 1937 or 1938?

(Testimony of George C. Woodard.)

A. No, it wasn't that late.

Q. Well, what about the Full-Ton Truck Company?

A. That was one of the original investments of Capital [156] Service.

Q. One of the original investments of Capital Service. Well now, when was that venture undertaken?

A. Approximately 1936.

Q. Approximately in 1936? A. Yes, sir.

Q. Now, how long did the Capital Investment Company continue its investment in the Timm Aircraft Corporation?

A. I don't know when they sold it. They still owned the stock in the Timm Aircraft when I terminated.

Q. Was that stock greater at the time you terminated your employment than at the initial investment?

A. I don't understand the word, "greater."

Q. All right. Isn't it a fact that Capital Service, Inc., increased its investment in the Timm Aircraft Corporation from the time it first invested in that company up until the time you left in 1942?

A. I don't recall that they did.

Q. What about the Full-Ton Truck Company? What became of that?

A. It went bankrupt.

Q. It went bankrupt? A. Yes, sir.

Q. Do you know about when it went bankrupt?

A. Within two years of the time I started. [157]

Q. Then it became bankrupt about 1937, somewhere around there? A. Approximately.

(Testimony of George C. Woodard.)

Q. How much money did Capital Service Corporation invest in the A & W Bakery Company when it was organized?

A. I couldn't answer that from memory.

Q. Well, do you have any approximate idea?

A. No, I can't recall. It was very complicated.

Q. Well, do you know whether or not it ever increased its holdings in A & W Baking Company from the beginning until the time you left there?

A. There were never but 20 shares of stock issued in the A & W up until the time I left; 20 shares of \$1.00 par.

Q. All right. Who owned the 20 shares?

A. Capital Service.

Q. They owned the shares from its organization on up to the time you left?

A. Yes, sir.

Q. What amount of money did those 20 shares represent?

A. \$20.00 I believe.

Q. \$20.00 per share?

A. No, a dollar per share.

Q. Is that all the money that the Capital Service Inc. ever put into that A & W Baking Company, just \$20.00?

A. As stock. [158]

Q. I mean \$200.00.

A. As stock, yes.

Q. Did they make any loans to that company?

A. Yes, they made several loans to that company.

Q. In substantial amounts?

A. No, not substantial. I don't recall the exact amounts.

(Testimony of George C. Woodard.)

Mr. Walker: If the Court please, I have sat and waited and watched this development. I would like to object on the ground of the immateriality of these questions regarding the subsidiary activities of Capital-Service.

Mr. Maiden: No, it is not immaterial.

If the Court please, the Petitioner is trying to leave the impression with the Court that the only reason why it didn't furnish more money to this Gas Fuel Service Company, or the California Utilities Company was because that they didn't have the money.

The Court: Is that question in the record?

Mr. Maiden: That question is in the record brought out by this witness on his direct examination.

Isn't that right, Mr. Walker?

Mr. Walker: That is right.

The Court: Very well. It is proper to proceed. I had forgotten.

Mr. Walker: So had I. [159]

Mr. Maiden: Do we have a question pending, Mr. Reporter?

(The record was read.)

By Mr. Maiden:

Q. All right, can you give this Court any approximation in the aggregate of the amount invested by this Petitioner in the A & W Baking Company after it was organized—whatever date

(Testimony of George C. Woodard.)

that was, the record is going to show it—up until the time you left there in 1942.

A. I would say ten to twelve thousand dollars.

Q. Over that same period of time they made additional investments in the Timm Aircraft Corporation, isn't that right?

A. I don't recall that they made additional investments in the Timm Aircraft.

Q. Now, did they make any investments in 1942 while you were in there; any other ventures?

A. I was not with them in '42.

Q. When did you leave them?

A. January—December 31, 1941.

Q. December 31, 1941. So you don't know anything on earth about what happened with this Capital Service, Incorporated, or any of these subsidiaries after that time, is that right?

A. I had no place in the picture after I terminated my employment. [160]

The Court: Anything further from this witness.

Mr. Maiden: Just one second, if the Court please.

By Mr. Maiden:

Q. By the way, there is just this one thing: I believe you said something about this Petitioner—not this Petitioner, but rather the Gas Fuel Oil Company settling a lawsuit with the Shell Oil Company or settling some kind of litigation, a claim?

A. I haven't mentioned anything about it.

Q. Well, is that a fact or not?

A. Yes, they did.

(Testimony of George C. Woodard.)

Q. I will ask you whether or not the proceeds from that settlement were not applied to the books of the Capital Service, Inc., as a credit against the indebtedness of Central California Utilities Corporation? A. Yes, it was.

Mr. Maiden: I believe that is all, if the Court please.

Mr. Walker: Just a very few questions, if the Court please, and I think we will be through with this witness.

The Court: All right.

Redirect Examination

By Mr. Walker:

Q. When you left the G. Brashears & Company for the Ryan [161] Company, why did you leave, Mr. Woodard?

A. There were very many reasons. The principal one was that I felt that the type of business Brashears & Company was engaged in was extinct for some time to come because of the war scare.

Q. I call your attention to the sale of the pipe line. Could you state why that line was sold?

A. Mr. Friend advised us——

Mr. Maiden: If your Honor, please, I object to that. It is hearsay and I object to it. I don't think this witness knows anything about it anyhow.

The Court: Do you know to your own knowledge?

The Witness: I know why we decided to sell it, yes, sir.

(Testimony of George C. Woodard.)

Mr. Maiden: He can tell why they decided to sell it, if he knows, but I want him to keep out of it any statement of any person who is not here in the case.

By Mr. Walker:

Q. Just tell the Court why you decided to sell it.

A. Because we were informed that the ranchers in some cases were stealing the pipe, and in other cases, they were damaging it and it was necessary to either put it under ground or if we wanted to get anything out of the pipe, to sell it then.

Q. You have been asked many questions about what your [162] personal knowledge was of this project. You stated that you were on the grounds once. Can you state in your experience with the Ryan Company how much action you take without actual personal knowledge?

A. 95 per cent of the things that I do are without absolute personal knowledge.

Q. Do you rely to any extent—or what information do you rely on, if you have that lack of personal knowledge?

A. The people who are assigned certain responsibilities and authority who pass the information on to me on which to base a decision.

Q. Was that the way in which you made the decisions with reference to Central California Utilities? A. Yes.

Q. Could you state, did Capital Service have an ample supply of money in 1937 and following years?

(Testimony of George C. Woodard.)

A. It did not.

Q. You have stated on cross-examination with reference to activities with the Full-Ton Truck and the Timm Aircraft—where did such money come from?

A. Any money put in by Capital Service after 1937 was borrowed by them from G. Brashears & Company.

Q. Then it was not the money of Capital Service?

A. That is correct.

Q. Without the corresponding indebtedness owed to someone [163] else?

A. That is correct.

Q. Could you tell why the borrowed money was used in preference in the Full-Ton Truck Company and in the Timm Aircraft business over the Central California Utilities' project?

Mr. Maiden: If he knows.

Mr. Walker: If he knows.

By Mr. Walker:

Q. Do you know, first?

A. I thought I did.

Q. What did you think?

The Court: Well, you know whether you know or not.

Mr. Maiden: No, I want him——

The Witness: I know my opinion.

The Court: That isn't the question propounded to you, Mr. Witness. The question is, do you know?

(Testimony of George C. Woodard.)

By Mr. Walker:

Q. Well, as an officer of Capital Service, Inc., was it necessary for you to decide which of several projects would take the money of the organization?

Mr. Maiden: Now, just a second. At this point, your Honor, I am going to make the objection to asking about their decisions and so on and so forth upon the ground that the best evidence would be found in the minutes of this corporation's [164] books.

The Court: Well, counsel for Petitioner, you understand that where an objection is made to evidence on the ground that it is not the best evidence, it must be ruled out. The best evidence in the case of this kind would either be the corporate records, or the knowledge of the man or men who had the information that they passed on to the directors. That would be the best evidence if we strictly adhered to the rules of evidence, and we must do that when an objection is made.

By Mr. Walker:

Q. Do you know what men were in possession of the facts with reference to the Full-Ton Truck and the Timm Aircraft projects? A. Yes.

Q. Who were they? A. I was.

Q. You were in possession of the facts, yourself of those projects? A. Yes, sir.

Q. Were you in possession also of the facts of the Central California Utilities' project?

A. After the first year or two, yes.

(Testimony of George C. Woodard.)

Q. Through information received by you, upon which you felt it was proper to act? [165]

A. That is correct.

Q. Did you yourself make any decision with reference to which project should be favored?

A. I made my—formed my own opinion and made recommendations accordingly.

Q. What recommendations did you make?

Mr. Maiden: Just a minute, if the Court please. That took place at a board of directors' meeting.

Mr. Walker: Well, let's ask him.

By Mr. Walker:

Q. Did it take place at a Board of directors' meeting?

The Court: I don't understand the witness, I am frank to say, when he says that 90 per cent of the information was second hand to him, in effect, a while ago.

Mr. Maiden: That is correct, and he had no personal knowledge with respect to this.

The Court: That is what the witness has stated. Now, I can't understand it.

Mr. Walker: Well, may I ask if the record won't already show the question of whether or not the information that you had with reference to these projects was information that you yourself had, or had been received from others?

The Witness: I was the sole representative of Capital Service and G. Brashears & Company in representing them in connection with Timm Aircraft and the bakery. [166]

(Testimony of George C. Woodard.)

The Court: Mr. Witness, will you please answer the question and it will save quite a bit of trouble.

The Witness: I will try, sir.

The Court: Your answer is not responsive to the question propounded.

The Witness: May I have the question again?

Mr. Walker: Would you read the question, please?

(The question was read.)

The Witness: Yes.

Mr. Maiden: Well, that is an alternative question. I don't know what your answer means.

The Witness: Well, it was both.

By Mr. Walker:

Q. You had personal knowledge and you also had information received from others?

A. Yes, sir.

Q. You used that information in making recommendations? A. Yes, sir.

Q. Were those recommendations made at a board meeting?

A. Not always. At times, yes. At other times, no.

Q. You cannot say that they were always made at board meetings?

A. No, they were not always made at board meetings.

Q. Can you say what recommendations were made other than at board meetings? [167]

Mr. Maiden: Now, your Honor, this witness can't answer that.

(Testimony of George C. Woodard.)

The Court: Are you objecting?

Mr. Maiden: I am objecting.

The Court: The objection is sustained.

By Mr. Walker:

Q. Do you have information in your possession, either of your personal knowledge or from what you have learned of others, that would put you in a position of recommending—

Mr. Maiden: Answer that yes or no.

By Mr. Walker:

Q. —which projects should be followed?

A. No.

Q. What was that information?

Mr. Maiden: Now, if the Court please, this witness has already said that sometimes these recommendations were made at directors' meetings, and at other times they were not.

The Court: The question is so general, I don't see how any witness could answer it.

Mr. Walker: Well, if the Court please, I think there is a very good reason why some of these projects were favored over others, and this witness is in possession of the reasons why.

Mr. Maiden: But not the best evidence. Now, the [168] best evidence is going to be, where he made recommendations at a board of directors meeting, let him produce the minutes of the board of directors' meeting.

Mr. Walker: He has just stated he did not confine his recommendations to those meetings.

(Testimony of George C. Woodard.)

Mr. Maiden: Well, the trouble is we don't know if these were made at board of directors' meetings and he don't know himself because he said some were made at board of directors' meetings and some were not. I want the facts in this case.

Mr. Walker: Well, if the Court please, that is what I want too, and I think the facts depend upon the knowledge of the individual. If he has seen fit to undertake responsible jobs, as he has now at Ryan Aircraft and as he previously had at G. Brashears & Company, and in the ordinary course of business, he took action from the information he had from reliable sources, I think the Court is entitled to know.

The Court: But, counsel for the Petitioner, you know that under the rules of evidence that when an objection is made that evidence produced is not the best, it is incumbent upon the opposite party to produce the best evidence. Now, this witness has already testified that he knows, but very little personally about these transactions. Now, are you seeking to impeach your own witness? [169]

Mr. Walker: No, if the Court please.

The Court: After he has gone on record to the extent that 95 per cent of the information that he has is not personal information and therefore he must have gotten it from some other source and the other sources would be the best evidence when opposing counsel insists upon the best evidence. That is the rules of evidence.

(Testimony of George C. Woodard.)

Mr. Walker: Well, I understand that, of course, your Honor. I have no further questions.

Mr. Maiden: No further questions.

The Court: May I ask the witness, just for my own information, what did the Capital Service Company pay for this certificate of convenience and necessity?

The Witness: It was not owned by Capital Service, your Honor, it was—the only thing Capital Service acquired was stock in the corporation and a note for the money that it advanced.

The Court: Well, what, if anything was paid, then, by the holder for this certificate of convenience and necessity?

The Witness: I don't think there is any charge for that other than the expense of getting it, and it had been obtained by the subsidiary of Inland before Capital Service entered the picture.

The Court: The reason I asked that was, my information, [170] and I probably could take judicial information of the laws of the State of California as to the fact that the certificates are issued to anyone who can make a proper showing as to the background and there is no monetary value involved in the ownership. The reason I asked that is quite a little stress has been made here today that among the assets involved here is a certificate of convenience and necessity and I was wondering if the law was different in California from what I usually understand it, that such things as that do not involve any cost.

(Testimony of George C. Woodard.)

Mr. Walker: No. Petitioner makes no such contention.

The Court: Very well. That is all for this witness then.

(Witness excused.)

The Court: Well, gentlemen, we will suspend until 9:30 o'clock tomorrow morning.

(Whereupon at 4:50 o'clock, p.m., an adjournment was taken until 9:30 o'clock a.m., Thursday, May 6, 1948.) [171]

Whereupon,

HARRY W. MOORE

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. State your name and address, please.

A. Harry W. Moore, 215 W. 7th Street, Los Angeles.

Q. Mr. Moore, what is your business or profession?
A. Certified Public Accountant.

Q. How long have you been in that business?

A. Since 1921.

Q. Since 1921? A. Right.

Q. In the course of that business, have you had

(Testimony of Harry W. Moore.)

occasion to be familiar with the books and records of Inland Public Service Company?

A. Yes, sir.

Q. What was that occasion?

A. We, I think, set up the original books and records for the Inland Public Service Company on or about 1933, and the general books and records of the Inland Public Service Company were kept in our office from field information sent down by Mr. Huse in the San Joaquin Valley, and we kept those books, until I think, 1935. [174]

Q. Did you have occasion to prepare any statements of assets and liabilities for the Inland Public Service Company? A. Yes, sir.

Q. Did that statement of assets and liabilities include the assets and liabilities of the subsidiary company? A. Yes, sir.

Q. Can you state whether or not you have knowledge of what those assets and liabilities were as of the end of 1935?

A. I know what the assets and liabilities were as shown by the books and records at that time.

Q. Did you make any statement of assets and liabilities from those books and records?

A. Yes, sir.

Q. I show you a document which is entitled "Inland Public Service Company, Statement of Assets, Liabilities and Capital of Inland Public Service Company and its Subsidiaries, Gas Fuel Service Company and Kettleman-Lakeview Oil and Gas

(Testimony of Harry W. Moore.)

Company as of December 31, 1935." Is that the statement of assets and liabilities that you say you prepared? A. Yes, sir.

Q. And that was prepared from the books and records of the Inland Public Service Company and its subsidiaries? A. That's right.

Q. Can you state what your knowledge was of the current assets of the Inland Company and its subsidiaries as of that date? [175]

A. Well, the books and records showed that the total amount of the current assets was approximately fifteen, sixteen hundred dollars.

Q. And would the books and records show what the status of the liabilities was as of that date?

A. Approximately \$60,000.00.

Q. Did the company show any other assets at that time?

A. Yes, the company had certain—The Inland Public Service Company was a holding company for the shares of capital stock of the Gas Fuel Service Company and the Kettleman-Lakeview Oil and Gas Company. When I say the Inland Public Service, I mean the combined assets, because the assets of the company itself, was only shares of capital stock.

Q. The combined enterprise of Inland and its subsidiaries?

A. They had certain wells, certain oil leases, and I think oil wells in the San Joaquin Valley, and I think pipe lines, franchises, and things of that kind.

(Testimony of Harry W. Moore.)

Q. Would the books show what the values of those assets were?

A. The books showed a value upon the assets.

Q. Did the statement which you prepared reflect those values?

A. The statement that we prepared reflected the values that had been placed upon the assets, yes.

Q. How were those values placed?

A. The original statements that were made up by our office show that the wells and leases were set up at a valuation as valued by Walter Stadler, petroleum geologist, and that the other valuations were formed by Louis Henkel, consulting engineer, and I am pretty sure that the books and records were set up based on those original values.

Q. Per the engineer and per the individual that you just mentioned?

A. That's right. This is the original statement that was made up based on those valuations.

Mr. Maiden: Who made that up?

The Witness: We made it up in our office based on those values.

Mr. Maiden: And these valuations came from Louis Henkel and Walter Stadler, is that right?

The Witness: That's right.

Mr. Maiden: Were they employees—

Mr. Walker: Just a minute. I will finish with him and then you can go ahead.

By Mr. Walker:

Q. You stated that the current assets were in

(Testimony of Harry W. Moore.)

the amount of some fifteen hundred or eighteen hundred dollars? A. That's right.

Q. What do you mean by current assets? [177]

A. I mean the cash and accounts receivable.

Q. What do you mean by the current liabilities?

A. The accounts payable, bank overdrafts, royalties payable, and other contracts payable.

Q. Were there any assets, to your knowledge, which could have been converted into cash?

A. Well, I think at that particular time, they probably could have converted some of the assets into cash. Yes. Back in '33 and '34.

Q. This was in '35 now.

A. That I don't know, whether they were converted into cash or not.

Q. Did you, Mr. Moore, have occasion to become familiar with the books and records of Capital Service, Incorporated? A. I did.

Q. Did you prepare statements of the assets of Capital Service, Incorporated? A. I did.

Q. Did those statements reflect the position of Capital Service, Incorporated, in connection with the Timm Aircraft, and the A and W Bakery?

A. They did.

Q. Could you state to the Court, the evolution of the bakery project?

A. The Capital Service, Incorporated, acquired certain [178] shares of capital stock, and made certain advances to the Ful-Ton Truck Company,

(Testimony of Harry W. Moore.)

which was a company that was manufacturing trucks.

The Court: You are testifying from what you find from the entries in the books?

The Witness: That's right; in 1930.

Mr. Walker: What year?

The Witness: April 30, 1940.

Mr. Walker: If the Court please, I would like at this time to clear up the confusion which seemed to exist at the end of Mr. Woodard's testimony.

The Witness: In the latter part of 1937, we found the Ful-Ton Truck Company had gone into 77 B, and the assets at the time that the company was under 77 B, consisted of various trucks, and trucks in process of production, and Capital Service finally ended up with a number of trucks. Capital Service subsequently used these trucks to start distributing routes for a bakery called the Kolb Distributing Company.

The next stage was, I think, they acquired a bakery, and finally merged the Kolb Distributing Company into the A. and W. Baking Company.

By Mr. Walker:

Q. Did the acquisition of the bakery have anything to do with this Kolb Distributing Company?

A. I think it was separate at the time that it was started, and then it was finally brought together. I think the reason [179] that they got the bakery was because they had the Kolb Distributing Company.

(Testimony of Harry W. Moore.)

Mr. Maiden: Is that speculation on your part, Mr. Moore? You say you think.

The Witness: Well, I don't know.

Q. (By Mr. Walker): What do the books show as to time, the way Kolb Distributing and the bakery came?

A. The books show that the first advances to Ful-Ton Truck was in April and May of 1937. It shows that in December of 1937, the Ful-Ton Truck Company goes into 77 B. The agreement between the Kolb Bakery and the Capital Service for the Capital Service to set up the Kolb Distributing Company was in June of 1938. And the A. and W. Baking Company came into existence in December of 1938.

Q. Are you able to say what the position of Capital Service was with reference to loans from G. Brashears and Company?

A. As of what dates?

Q. As of any time following January 1, 1938.

A. The general ledger of the Capital Service, Incorporated, shows in an account headed, "Notes Payable, G. Brashears and Company" indicates the first advances by G. Brashears and Company to the Capital Service under date of June 30, 1937, in the amount of \$23,500. At the end of 1937, the balance of the G. Brashears and Company was \$41,500.00. [LSC]

Q. In 1938?

A. At the end of 1938, the amount was \$36,338.

(Testimony of Harry W. Moore.)

Q. '39? A. \$41,203.28.

Q. '40? A. '40 was \$55,845.45.

Q. '41? A. \$55,824.34.

Q. And '42?

A. None. At the end of '42, the record indicates that the amount was transferred to a note payable. \$13,095.24 was transferred to a note payable, and the total amount of the notes payable, as of the end of '42, was \$13,095.24.

Q. You mean 1942?

A. 1942. December 31, 1942.

Mr. Walker: No further questions.

Cross-Examination

By Mr. Maiden:

Q. Mr. Moore, this statement of assets and liabilities and capital of Inland Public Service Company and its subsidiaries, Gas Fuel Service Company and Kettleman-Lakeview Oil Company, which you just identified being as of December 31, 1935, I believe, show the pipe lines under "assets" at a value of \$44,740.78, is that right?

A. That's right. And you will note that a part of the [181] land and leases and a part of the wells had been abandoned by that time.

Q. I didn't ask you anything about that, Mr. Moore. This also shows meters and regulators of \$354.56, is that right? A. That's right.

Q. It shows general office equipment?

A. \$463.98.

Q. Miscellaneous equipment of \$407.55?

(Testimony of Harry W. Moore.)

A. Right.

Q. And it does have a set-up here for land and leases, \$901,112.50, is that correct?

A. That's right.

Q. And then it shows wells in the amount of \$200,000.00, which as you so gratuitously pointed out had been quitclaimed and lost; that was of December 31, 1935?

A. That's right.

Q. This also shows in "liabilities," Anderson-Friend Bonus Contract.

A. Bonus Account.

Q. In other words, they had some sort of arrangement whereby they were using the gas well of Anderson-Friend, is that right, and they were paying him some bonus?

A. That note probably will tell you down at number two.

Q. "Eliminated through quitclaiming leases. These [182] adjustments will require a new capital set-up." Does that apply also to the Friend-Fiske-Roberts Account Payable? What would that be, do you know?

A. I don't know.

Q. "Contingent Account Payable-Natural Gas Corporation of California." What would that represent, do you know anything about that?

A. I haven't seen the figures for 12 years.

Q. Well, were you present during the testimony of Mr. Moore yesterday?

A. I was here from about 3 o'clock on.

Q. Did you hear Mr. Moore testify that Kettleman-Lakeview Oil Company had leases on land and wells at the time they started up in '36 and '37?

(Testimony of Harry W. Moore.)

A. At the time that I came, I did not.

Q. You didn't hear him testify to that?

A. No.

Q. You don't know whether or not these quit-claim leases on wells and lands were regained after December 31, 1935, do you?

A. I do not. No. All I know is that that statement was prepared at that time by our office, and typed by our office from the books and records. I haven't seen the books since 1930, about that time.

Q. And the values that you have used in this report [183] came from some valuation engineers?

A. That's right.

Q. Do you know whether or not those valuation engineers, do you know how they arrived at their value? A. No, I do not.

Q. You don't know how accurate that value is, do you? A. No.

Q. So as far as you know, they could be understated or overstated? A. That's right.

Mr. Maiden: No further questions.

The Court: Is there anything further?

Mr. Walker: Nothing from this witness.

Mr. Maiden: Just a moment, I have some more, if the Court please. I just spoke up a little too quick.

Cross-Examination (Continued)

By Mr. Maiden:

Q. Mr. Moore, I will ask you to examine this

(Testimony of Harry W. Moore.)

document which purports to be an audit statement made by you as of April 30, 1940, with respect to the Capital Service Incorporated, their financial condition, and will ask you if you can identify that as being a copy of your document, disregarding the red mark.

A. This appears to be a copy of this report prepared by our office. [184]

Q. Now, while Mr. Walker is examining that document, Mr. Moore, I will ask you, keeping in mind the same questions asked about the former document, if you will identify this document dated February 4, 1941?

A. I am sure it is a copy of the report—without checking every figure in it. We can furnish the actual copies that were made, if you want to check the wording.

Q. I want this identified as positively a copy. If you have any reservations to make, let's check it with the copy that you have.

A. If you want me to check it, I'll be glad to do it right now.

Q. I want you to check it and tell the Court whether or not what I handed you is an exact copy, so that I can offer it in evidence. You might do that with both documents, if there was any such reservation with respect to the first one.

A. I will be very glad to compare them. I would say this was a copy, yes.

Mr. Maiden: If the Court please, I would now

(Testimony of Harry W. Moore.)

like to offer in evidence Respondent's Exhibit K, the audit statement just identified by Mr. Moore, bearing date of July 1, 1941, and showing the financial condition of the company as of April 30, 1940.

Mr. Walker: No objection.

Mr. Maiden: If the Court please, in regards to this [185] document, there are certain red pencil marks that have been made on them which emphasize certain phases of it. Therefore, I would like leave to withdraw this and have a copy made, with Mr. Walker, and substitute another copy for this.

Mr. Walker: It is agreeable to me.

Mr. Maiden: I am doing this for Mr. Walker's benefit because we have underlined certain parts of this thing, and he probably might not want those points highlighted to the exclusion of any other point.

Mr. Walker: I think a copy can be supplied in lieu of this one.

The Court: It will be received in evidence as Respondent's Exhibit K, with leave given to withdraw the original, and substitute a copy of the same, omitting the emphasis in the original. Is that satisfactory?

Mr. Walker: That is satisfactory.

(The document above referred to was received in evidence and marked Respondent's Exhibit K.)

(Testimony of Harry W. Moore.)

RESPONDENT'S EXHIBIT K

Thomas & Moore
Certified Public Accountants
215 West Seventh Street
Los Angeles, Calif.

July 1, 1940

Capital Service, Inc.,
510 South Spring Street,
Los Angeles, California.

Gentlemen—

We have made a detailed audit of your books and records as of April 30, 1940, checking all cash receipts and cash disbursements, which are all properly accounted for. We have also made a survey of the various deals that have been entered into by Capital Service, Inc., and submit herewith the following statement and comments, which in our opinion reflect your financial condition as of April 30, 1940—

Statement of Assets, Liability and Capital
as of April 30, 1940.

General Comments—

Capital Service, Inc., was incorporated under the laws of the State of California on April 23, 1936, with an authorized capital of 50,000 shares of Class A capital stock having a par value of \$10.00 per share and 50,000 shares of Class B capital stock, with a par value of \$1.00 per share. The corpora-

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)

tion was organized for the principal purpose of assisting financially in the development and the sponsoring of commercial enterprises.

The Class A shares are entitled to 6% cumulative dividends and any further earnings are to be distributed, one-half to the holders of the Class A shares and one-half to the holders of the Class B shares.

Under date of July 14, 1936, a permit was obtained from the Commissioner of Corporations of the State of California, authorizing the sale and issuance of:

(1) 15,000 shares of Class A stock to be sold at par for cash, subject to a selling expense of not to exceed 6%; and

(2) Whenever and as often as shares are sold and issued under paragraph (1), to issue a certificate or certificates of its Class B stock to any or all of the following-named persons: G. Brashears, E. A. Grumm, M. B. Price, G. C. Woodard and F. E. Dent for organization and management services, but not to exceed 15,000 shares.

To April 30, 1940, there have been issued 10,995 shares of Class A stock and 10,995 shares of Class B stock. The Class B shares were required to be escrowed subject to the further order of the Commissioner of Corporations. Under date of March 18, 1937, the Commissioner of Corporations authorized the transfer in escrow of the 10,995 shares of Class B stock to G. Brashears & Company. The

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)

expenses in connection with the organization of the company and the issuance of the stock were paid by G. Brashears & Company with the exception of the commission of 6% upon the sale of the stock, being the amount paid by G. Brashears & Company to its salesmen.

The principal ventures engaged in by Capital Service, Inc., are the following:

E. B. Christopher

Timm Aircraft Corporation

Central California Utilities

Ful-Ton Truck Company and Bakery
Venture

E. B. Christopher—

During February and March of 1937 advances were made to E. B. Christopher totaling \$1,850.00 upon a deal in connection with an airplane factory in Wichita, Kansas, a chattel mortgage upon two planes then owned by Mr. Christopher being taken as collateral for the advance. In the early part of 1938 one plane was wrecked on the Ridge Route, Mr. Christopher losing his life in the wreck. \$825.00 was recovered upon sale of the remaining plane and \$1,025.00 written off as a loss.

Timm Aircraft Corporation—

During the period of time that the organization

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)
and financing of Capital Service, Inc., was in progress, G. Brashears & Company, for the account of Capital Service, Inc., entered into an agreement with O. W. Timm and W. D. Timm for the preliminary financing of the Timm Aircraft Corporation, and \$7,000.00 was advanced upon this agreement. Subsequent advances by Capital Service, Inc., to O. W. and W. D. Timm and the Timm Aircraft Corporation totaled \$38,000.00 which, together with the original \$7,000.00, made aggregate advances of \$45,000.00. Interest was accrued upon the notes as of June 30, 1939, of \$650.00. As of June 30, 1937, certificate No. T13 for 35,000 shares of capital stock of the Timm Aircraft Corporation was issued to Capital Service, Inc., and the sum of \$35,000.00 was credited against the advances. Subsequently \$10,650.00 was received in cash by Capital Service, Inc., covering the remainder of the \$10,000.00 advanced and the \$650.00 of interest. In addition to the 35,000 shares of capital stock received for the \$35,000.00 of indebtedness cancelled, Capital Service, Inc., received 9,800 shares of stock from O. W. Timm and W. D. Timm at no cost.

The Timm Aircraft Corporation subsequently made application to the Division of Corporations of the State of California for the sale and issuance of 99,000 shares of capital stock, and the Division of Corporations required that 11,000 shares of capital stock heretofore issued be returned to the treasury and cancelled. Therefore 4,400 shares of the

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)

9,800 shares of capital stock received from O. W. Timm and W. D. Timm were surrendered to the corporation for cancellation and a new certificate issued for 5,400 shares.

In accordance with an agreement dated May 1, 1936, between O. W. Timm and W. D. Timm and G. Brashears & Company, and amended January 18, 1939, certain shareholders of the corporation, Capital Service, Inc., O. W. Timm and W. D. Timm agreed to transfer to G. Brashears & Company a total of 15,000 shares of the corporation's \$1.00 par value stock owned by them. O. W. Timm and W. D. Timm transferred to G. Brashears & Company 5,400 shares and 3,600 shares, respectively, a total of 9,000 shares owned by them individually. G. Brashears & Company declined the delivery from Capital Service, Inc., of the 6,000 shares it was to receive from such affiliate and donated the 6,000 shares to Capital Service, Inc.

Under date of March 27, 1939, Capital Service, Inc., purchased from O. W. Timm 1,250 shares for a total consideration of \$1,000.00, being at the rate of \$.80 per share, which shares of capital stock are issued in the name of George C. Woodard as nominee for Capital Service, Inc. Therefore, as of April 30, 1940, Capital Service, Inc., owned 41,650 shares of capital stock of the Timm Aircraft Corporation, at a total cost of \$36,000.00, making a net cost of approximately \$.864 per share.

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)

Central California Utilities—

Capital Service, Inc., owns 188,550 shares of the capital stock of Central California Utilities, which are carried upon their books at a net cost of \$1,300.00, and the records show advances to the Central California Utilities in the amount of \$31,567.81.

The Central California Utilities is the outgrowth of the reorganization of Inland Public Service Company. 187,500 shares of the capital stock were received for promotional services and are subject to a one-eighth interest in any profits that may be received therefrom, the assignment of the interest being to Elmer J. Walther, attorney at law, as part of his fee.

1,500 shares of capital stock were acquired by purchase from H. A. Savage. Capital Service, Inc., and R. W. Moore entered into an agreement with Mr. Savage, to purchase 3,000 shares of the stock at \$1.00 per share, and subsequently there was paid to him \$2,600.00 in full settlement of the agreement, \$1,300.00 of which was paid by R. W. Moore and \$1,300.00 by Capital Service, Inc. For the \$1,300.00 paid by Capital Service, Inc., 1,500 shares of Capital stock were received.

Mr. Henry K. Elder, attorney at law, had a claim against Kettleman Lakeview Oil & Gas Company, Ltd., and/or Gas Fuel Service Company, subsidiaries of Central California Utilities, for previous

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)

legal services, and in settlement thereof Capital Service, Inc., delivered to him 450 shares of the capital stock that had been purchased from Mr. Savage, leaving Capital Service, Inc., with 188,550 shares of stock, at a net cost of \$1,300.00. The 187,500 shares of capital stock are in escrow with the Bank of America, subject to the further order of the Commissioner of Corporations.

The only asset remaining appears to be the franchise for distribution of gas held by Gas Fuel Service Company, a subsidiary. The company originally had two gas wells, one of which was ruined by the derrick blowing down, allowing the gas to blow out and ruin the structure. The structure of the second well was damaged by dynamite blasts in testing adjacent territory. One new well was drilled but a water shut-off could not be obtained.

Ful-Ton Truck Company and Bakery Venture—

The company's investment in stock in Ful-Ton Truck Company consisted of the purchase of 5,900 shares (representing approximately 59% of the total stock), at a cost of \$26,000.00. In April and May, 1937, the company made unsecured loans to Ful-Ton Truck Company amounting to \$16,500.00. During June, 1937, the company loaned an additional \$15,725.00, secured by 17 trucks, for the purpose of completing these 17 trucks and 13 addi-

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)

tional trucks. In July, 1937, they had finished the 30 trucks and sold and delivered the 13 trucks retained by them. At that time Ful-Ton Truck Company had on hand parts and materials for approximately 60 additional trucks and it appeared that there was a market for this type of vehicle. The Ful-Ton Truck Company, however, was again out of funds and confidence had been lost in its management. A deal therefore was made with National Iron Works of San Diego in which they agreed to buy the parts for 30 trucks, and to complete the construction thereof in their plant at San Diego. The arrangement included the sale of these trucks by Ful-Ton Truck Company. In order to consummate this deal it was necessary to arrange funds to the extent of \$30,000.00 to National Iron Works. Capital Service, Inc., therefore purchased 20,000 shares of National Iron Works stock at \$1.00 per share, borrowing such funds from the United States National Bank of San Diego and Citizens National Bank of Monrovia. (These sums were subsequently repaid.) Capital Service, Inc., purchased 20,000 shares of National Iron Works stock from U. S. Holding Company, a substantial stockholder of National Iron Works, who in turn was to lend such funds to National Iron Works. G. Brashears & Company bought, in accommodation to Capital Service, Inc., 10,000 shares of National Iron Works at \$1.00 per share. The arrangement included the sale

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)

at a later date by G. Brashears & Company of the 30,000 shares of National Iron Works stock. This was accomplished at a later date without profit or loss to Capital Service, Inc.

In December, 1937, Ful-Ton Truck Company filed a petition under 77(b). During the period of time immediately prior to the filing of the petition and subsequent to the previous advances to the Ful-Ton Truck Company set forth above, additional sums were advanced to Ful-Ton Truck Company on unsecured loans totaling \$3,325.00. During this same period of time Capital Service, Inc., was reimbursed the sum of \$7,401.28 upon its secured loans, 8 trucks having been sold by Ful-Ton Truck Company. As of the date of filing the petition under 77(b) the investment was as follows—

| | |
|---|-------------|
| Investment in Stock | \$26,000.00 |
| Advances on Unsecured Loans..... | 19,825.00 |
| Secured Loans—9 trucks as collateral... | 8,323.72 |

There was subsequently expended on the 9 remaining trucks \$1,379.99 for conditioning for sale, and later 3 of the 9 trucks were sold. Additional advances were made during the period the company was under 77(b) totaling \$1,512.66, of which \$772.84 was recovered, leaving the net amount advanced and unrecovered, \$739.82.

In an endeavor to dispose of the remaining trucks and to supply an outlet for additional trucks be-

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)

ing built by National Iron Works, 3 trucks were put on trial at Kolb's Bakery for a period of some four months. On June 8, 1938, an agreement was entered into between Kolb's Bakery and Capital Service, Inc., whereby Kolb's granted to Capital Service, Inc., the exclusive sales rights to its bakery products at a 40% discount, the operations to be carried on under the name of Kolb's Distributing Company, and stockholders of Kolb's Bakery gave Capital Service, Inc., an option to purchase 90% of the stock of Kolb's Bakery at the total purchase price of \$100.00. Kolb's Distributing Company took over the 6 trucks from Capital Service, Inc. Kolb's Distributing Company thereafter purchased 15 Ful-Ton Trucks from National Iron Works.

On December 31, 1939, the A. & W. Baking Company, a corporation, was organized to take over the Kolb's Distributing Company, which company also took over the operations of Kolb's Bakery. The total investment of Capital Service, Inc., in the 5,900 shares of the Ful-Ton Truck Company totaling \$26,000.00, the unsecured advances to the Ful-Ton Truck Company totaling \$19,825.00, and unrecovered advances after the Ful-Ton Truck Company filed its petition under 77(b) totaling \$739.82, making a total of \$46,564.82, was written off the books of Capital Service, Inc., as a loss, and \$26,-

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)

344.03 is carried forward on the books as an asset, being the total investment in the bakery venture as of April 30, 1940. The \$26,344.03 is represented by the amounts disbursed for trucks and sums due from the A. & W. Baking Company, either for assets transferred or cash advanced, together with the various routes in the distributing system. We are advised by the officers of the Capital Service Company that their future plans contemplate a consolidation with some other bakery or the sale of their option and the distributing system, but no arrangement has as yet been consummated. The ultimate value of the asset will depend upon the success of the project, which is contingent upon increasing the present volume of sales, or the consolidation as above outlined.

Notes and Accounts Payable—

The notes and accounts payable are to G. Brashears & Company, totaling, \$43,739.20. Of the above amount \$41,500.00 was advanced from May 1 to December 31, 1937, the funds having been used by Capital Service, Inc., in advances to the Ful-Ton Truck Company and Kolb's Distributing Company. Notes and accounts payable to G. Brashears & Company at one time reached a total of \$51,134.00. No interest has been paid to G. Brashears & Company or accrued upon the obligation, G. Brashears & Company advising us that it is not

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)
 their present intention to make any charges for interest.

Respectfully submitted,
THOMAS & MOORE,
 Certified Public Accountants.

By /s/ **HARRY W. MOORE.**

Statement of Assets, Liabilities and Capital
 as of April 30, 1940

ASSETS

| | | | |
|---|-------------|-----------|---------------------|
| Cash in Bank | | \$ 631.80 | |
| Investment in Central California Utilities Corporation— | | | |
| 188,550 shares of stock—at cost..... | \$ 1,300.00 | | |
| Note Receivable | 31,567.81 | | 32,867.81 |
| | | | <hr/> |
| Investment in Bakeries Deal..... | | | 26,344.03 |
| Investment in Timm Aircraft Corporation— | | | |
| 41,650 shares of stock—at cost..... | | | 36,000.00 |
| Miscellaneous Assets— | | | |
| Note Receivable, Peter J. Bressi..... | \$ 59.00 | | |
| Note Receivable, George Kent..... | 129.03 | | |
| Stock, A. & W. Baking Company— | | | |
| 20 shares—at cost | 20.00 | | 208.03 |
| | | | <hr/> |
| Other Assets— | | | |
| Commissions paid on sale of capital stock.... | \$ 6,597.00 | | |
| Good Will and Management..... | 10,995.00 | | 17,592.00 |
| | | | <hr/> |
| | | | <u>\$113,643.67</u> |

LIABILITIES

| | | | |
|---|--|--------------|---------------------|
| Notes Payable—G. Brashears & Company..... | | \$ 40,036.00 | |
| Accounts Payable—G. Brashears & Company.. | | | 3,703.20 |
| | | | <hr/> |
| | | | <u>\$ 43,739.20</u> |

(Testimony of Harry W. Moore.)

Respondent's Exhibit K—(Continued)

CAPITAL

| | | |
|--|--------------|--------------|
| Authorized—50,000 shares Class A Stock— | | |
| Par Value \$10.00..... | \$500,000.00 | |
| Unissued | 390,050.00 | |
| | <hr/> | |
| Issued and Outstanding..... | \$109,950.00 | |
| | <hr/> | |
| Authorized—50,000 shares Class B Stock— | | |
| Par value \$1.00..... | \$ 50,000.00 | |
| Unissued | 39,005.00 | |
| | <hr/> | |
| Issued and Outstanding | \$ 10,995.00 | |
| | <hr/> | |
| Total Capital Stock Issued and Outstanding.. | \$120,945.00 | |
| Deficit | 51,040.53 | 69,904.47 |
| | <hr/> | <hr/> |
| | | \$113,643.67 |
| | | <hr/> <hr/> |

Admitted May 11, 1948, T.C.U.S.

Mr. Maiden: If the Court please, I would like to offer in evidence a similar statement made by Mr. Moore, of the financial condition of the Petitioner as of December 31, 1940, dated February 4, 1941, with the request, since we have some similar emphasis on this document, that we be allowed to substitute a copy, and leave out the emphasis.

Mr. Walker: If the Court please, I have agreed with [186] counsel with respect to these documents, that I would raise no objection to his introducing them, although they contain matters which I have not gone over on my direct examination with this witness.

(Testimony of Harry W. Moore.)

I have asked this witness concerning his audit report of Capital Service in connection with the Kolb Distributing, and the bakery, and Timm Aircraft. These documents contain also reference to the Central California Utility project. As to those references which are made, they were not covered on my direct examination, but I have agreed with counsel not to object on that ground to these documents being admitted as evidence.

However, this last document that was offered for evidence contains statements of this witness with reference to the value of Central California Utility project. I wish to make it clear that I have no objection to it going in evidence if I can have full freedom in quizzing the witness on the basis of that opinion and completely explore it, and not be blocked by objections counsel might otherwise raise.

Mr. Maiden: If the Court please, I am handing in these audit statements made by Mr. Moore. It is true they were made at later dates than the audit statement he referred to about the Inland Company. However, those audit statements of the Inland Land Company required was the auditing of the subsidiaries of that earlier period, and here were audit statements made by Mr. Moore in later years, and not getting into our crucial years, in which he treats light of the financial condition of two of the subsidiaries.

It is true, he does also mention Central California Utilities Corporation, but the Court must keep in

(Testimony of Harry W. Moore.)

mind that this whole new project was simply an outgrowth of this Inland Company, and I think it is admitted properly for all purposes under cross-examination of this witness.

I don't think I have gone beyond the scope of cross-examination, and Mr. Walker, of course, on redirect examination of this witness, can have his witness, and examine him with respect to anything that is in here, if he has any explanations to make.

Mr. Walker: I understand that to be the case, of course, your Honor, that I will be able to re-examine him, but the only thing about this report to which I object is the witness' statement of opinion, and that is sometimes a difficult thing to fully explore without counsel's objection.

The Court: If that is offered for the purpose of having it bear in this case as to the witness' opinion, certainly on redirect, counsel for Petitioner would have the right to question the witness on the opinions expressed.

Mr. Maiden: From this witness' explanation regarding expression of value, I am aware of that fact. That is perfectly true. [188]

The Court: Counsel for Respondent favors some limitation?

Mr. Maiden: Here is the situation, your Honor. It will develop in this case, and it is true, if I may explain, Mr. Moore is the employed accountant of Capital Service Incorporated, and he has represented Capital Service Incorporated in all of the

(Testimony of Harry W. Moore.)

proceedings. He is a prejudiced witness. He is bound by answers of Mr. Moore. I think if he got an opportunity, he would burn me up. I don't want to be bound by his answers, and I don't think I should be bound by his answers.

The Court: As I understand the situation, counsel for Respondent now seeks to enter into evidence a statement compiled by this witness, in which this witness has expressed an opinion. Now, if that is to go into evidence, certainly it is competent for opposing counsel to interrogate this witness about the matters, any matters or things stated in that report.

Mr. Maiden: I agree your Honor. He may do that on redirect, but he may not proceed to take this witness as my witness, and then cross-examine him. He must stay within the rules of direct evidence here, of the examination of your own witness is the point I was making, your Honor.

The Court: I think counsel for Respondent has laid down the bars as to the expression of opinion and judgment by the introduction of this in evidence. [189]

Mr. Maiden: Your Honor, I have no objection to Mr. Walker asking any competent question expressed in a competent manner from his own witness to explain anything he wants to in that document, but I don't want Mr. Moore to express in this case, as my witness, answers he may give to Mr. Walker that would be binding on me. That is the point I am making.

(Testimony of Harry W. Moore.)

The Court: I have stated to counsel, that counsel for the Petitioner may interrogate this witness as to any matters set forth in that report that counsel for Respondent is offering in evidence as to his expressions of value.

Mr. Maiden: Thank you, your Honor. That is perfectly all right.

The Court: Do we have an understanding about that, gentlemen?

Mr. Maiden: It is perfectly all right, except that I don't consider that Mr. Moore is my witness.

The Court: Well, he is not your witness, yet.

Mr. Maiden: Thank you, your Honor. I am sorry I made so much about this thing.

The Court: You have asked this witness to identify certain documents, and that is as far as you got.

Mr. Walker: Do I understand before we leave this particular subject, your Honor, that bars are down on questions regarding valuation. [190]

The Court: I am not going to lay down any broad general principles. I don't know, gentlemen. I am telling you that you have the right to interrogate this witness as to what his expressions of opinion in this document contain.

Mr. Maiden: I understand, your Honor.

The Court: It isn't throwing the thing wide open on expression of opinion in general.

Mr. Walker: As to this witness' opinion of the value of the project, as he stated in the report, I can quiz him——

(Testimony of Harry W. Moore.)

The Court: Proceed, gentlemen.

Mr. Maiden: I now offer in evidence this letter of February 4, 1941, from Mr. Moore to the petitioner stating the financial condition of the petitioner as of December 31, 1940, and ask for the privilege, since we have some emphasis on this document, of substituting a copy and leaving out the emphasis.

The Court: It will be received in evidence as Respondent's Exhibit L; leave given to withdraw the original and substituting a copy thereof omitting the emphasis indicated in the original.

(The document above-referred to was received in evidence and marked Respondent's Exhibit L.)

RESPONDENT'S EXHIBIT L

Thomas & Moore
Certified Public Accountants
215 West Seventh Street
Los Angeles, Calif.

February 4, 1941

Capital Service, Inc.,
510 South Spring Street,
Los Angeles, California.

Gentlemen—

We have made an audit of your books and records as of December 31, 1940, also checking all recorded

(Testimony of Harry W. Moore.)

cash receipts and cash disbursements. We submit herewith, supplementing our report dated July 1, 1940, covering your audit as of April 30, 1940, the following statement and comments, which in our opinion reflect your financial condition as of December 31, 1940—

Statement of Assets, Liabilities and Capital as of December 31, 1940.

Respectfully submitted,

THOMAS & MOORE,

Certified Public Accountants.

By /s/ HARRY W. MOORE.

Statement of Assets, Liabilities and Capital
as of December 31, 1940

ASSETS

| | | | |
|--|----|-----------|---------------------|
| Cash in Bank | | \$ | 100.67 |
| Investment in Central California Utilities Corporation—Note A— | | | |
| 188,550 shares of stock—at cost..... | \$ | 1,300.00 | |
| Note Receivable | | 31,567.81 | 32,867.81 |
| Investment in Bakeries Deal—Note B | | | 39,048.08 |
| Investment in Timm Aircraft Corporation— | | | |
| 41,650 shares of stock—at cost..... | | | 36,000.00 |
| Miscellaneous Assets— | | | |
| Note Receivable—Peter J. Bressi..... | \$ | 59.00 | |
| Note Receivable—George Kent..... | | 129.03 | |
| Stock, A. & W. Baking Company— | | | |
| 20 shares—at cost | | 20.00 | 208.03 |
| Other Assets— | | | |
| Commissions paid on sale of capital stock.... | \$ | 6,597.00 | |
| Good Will and Management..... | | 10,995.00 | 17,592.00 |
| | | | <u>\$125,816.59</u> |

(Testimony of Harry W. Moore.)

LIABILITIES

| | | |
|---|----------|---------------------|
| Notes Payable—G. Brashears & Company | } Note C | \$ 40,036.00 |
| Accounts Payable—G. Brashears & Company | | 15,845.37 |
| | | <u>\$ 55,881.37</u> |

CAPITAL

| | | |
|--|--------------|---------------------|
| Authorized—50,000 shares Class A Stock— | | |
| Par Value \$10.00 | \$500,000.00 | |
| Unissued | 390,050.00 | |
| Issued and Outstanding | \$109,950.00 | |
| Authorized—50,000 shares Class B Stock— | | |
| Par Value \$1.00 | \$ 50,000.00 | |
| Unissued | 39,005.00 | |
| Issued and Outstanding | \$ 10,995.00 | |
| Total Capital Stock Issued and Outstanding.... | \$120,945.00 | |
| Deficit | 51,009.78 | 69,935.22 |
| | | <u>\$125,816.59</u> |

Note A—The investment in stock in the Central California Utilities Corporation is carried at cost, and the note receivable represents cash advances. The investment is of doubtful value. The only remaining asset appears to be a franchise for the distribution of gas held by Gas Fuel Service Company, a subsidiary.

Note B—Investment in Bakeries Deal—

The investment in the bakeries deal represents advances to and for the account of Kolb Distributing Company and A. & W. Baking Company. The A. & W. Baking Company is a corporation which was organized to take over the bakery operations formerly conducted by the Kolb Distributing Company. The latter retained only the trucks subject

(Testimony of Harry W. Moore.)

to the liabilities thereon. The principal assets of the Kolb Distributing Company and the A. & W. Baking Company consist of the equipment and trucks, together with the various routes in the distributing system. The ultimate value of the assets will depend upon the success of the project, which is contingent upon increasing the present volume of sales or in working out a consolidation with some other bakery.

Note C—The notes and accounts payable to G. Brashears & Company represent total advances to or for the account of Capital Service, Inc., or companies in which Capital Service, Inc., is interested. No interest has been paid to G. Brashears & Company, or accrued upon the obligation, G. Brashears & Company advising us that it is not their present intention to make any charges for interest.

Mr. Maiden: No further questions.

(Discussion off the record.) [191]

Redirect Examination

By Mr. Walker:

Q. Mr. Moore, in what you have identified as a copy of your report dated February 4, 1941, as being a statement of the assets and liabilities of Capital Stock as of December 31, 1940, you have stated, as in note A, that the investment of Capital Service in the stock of Central California Utilities is carried at cost, and the note receivable represents

(Testimony of Harry W. Moore.)

cash advances. You also state that that investment is of doubtful value. Can you explain what you mean by that?

A. Generally in accounting terms, an account receivable or a note receivable is either good, or it is doubtful, or it is bad.

Q. And what are the standards?

A. In the case of the Central California Utilities Corporation, we had made a previous audit as of April 30, 1940, and there had been no payments on the account between the date of April 30, 1940 and December 31, 1940—the account was in the same condition, I think, on the two dates—and there apparently had been no effort to collect; and in usual accounting terminology, I think, we merely show that the account is in doubt.

Q. Did you make any investigation as to this account?

A. We made inquiry. We found that the only remaining asset was the certificate from the State Railroad Commission—Certificate of [192] Public Convenience, or Public Necessity, whatever that term is, which was owned by the Gas Fuel Service Company. The Gas Fuel Service Company being the subsidiary of the Central California Utilities.

Q. You have already stated what you have found to be the assets and liabilities of the Inland Public Service Company in 1935. If you had stated an indebtedness of the thirty-two some odd thousand dollars that existed here as of December 31, 1935,

(Testimony of Harry W. Moore.)

would you have classified that as of doubtful value?

A. Will you read the question?

Mr. Maiden: I object to that as being a purely hypothetical question.

Mr. Walker: I believe we can qualify this witness as an expert. He has been a C.P.A. since 1922.

Mr. Maiden: I think the questions ought to be based on fact.

The Court: The witness has testified that he is a Certified Public Accountant, and the question is directed at the accounts from a professional accounting. You may proceed.

The Witness: Will you read the question?

(The question was read.)

The Witness: If this \$32,000.00 had been a liability of the Inland Public Service Company as of December 31, 1945?

Mr. Walker: 1935.

The Witness: I would have stated that it was of doubtful [193] value.

Mr. Walker: No further questions.

Recross-Examination

By Mr. Maiden:

Q. Mr. Moore, in making audits of books, every time you find an obligation owing to the corporation whose books you are auditing has not changed from one year to the next, do you always state that that asset is of doubtful value?

(Testimony of Harry W. Moore.)

A. No. If I may explain—If the corporation had a considerable amount of tangible assets, and it was evident that there would be no question about the payment, on the account, we would not classify it as a doubtful asset.

Q. So that in stating that it was an asset of doubtful value, then, you based that upon facts other than that there had been no change in the obligation from April 30 of 1940, to December 31, 1940, is that correct?

A. Yes. I think the note goes farther and says that the only remaining assets appears to be the certificate.

Q. Yes?

A. In other words, if the company had had a vast amount of tangible assets, you would look at it a whole lot different than you would, if the only assets of the company was an intangible asset.

Q. In stating that the investment was of doubtful value, you took into consideration, of course, the only [194] so-called asset, being the Certificate of Necessity? A. That's right.

Mr. Maiden: I believe there are no further questions, your Honor.

The Court: You may stand aside.

(Witness excused.)

Whereupon,

G. BRASHEARS

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. Will you state your name and address, please?

A. G. Brashears, 1544 Virginia Avenue.

Q. What is your present employment, Mr. Brashears?

A. Well, I am President of G. Brashears and Company—Several other occupations, as well.

Q. Are you the Director of any corporations?

A. Yes.

Q. What are they?

The Court: Would you mind speaking a little louder?

The Witness: Gladden Products Incorporated, Lincoln Foundry Corporation, Timm Aircraft Corporation, Capital Service, Lockheed Aircraft Corporation. [195]

By Mr. Walker:

Q. What is the business of G. Brashears and Company? A. Security business.

Q. How long has G. Brashears and Company been in the security business?

(Testimony of G. Brashears.)

A. Since '22. That is, with its predecessors. There have been consolidations, etc. It started in 1922.

Q. You have been President of the present company, or its predecessor since 1922?

A. Yes.

Q. You stated that you are a Director of Capital Service, Incorporated. Are you familiar with the formation of that company? A. Yes.

Q. Did you have anything to do with the formation? A. Yes.

Q. What did you have to do with it?

A. Well, I fathered it on matters of organizing properties, etc.

Q. Could you state whether you were one of the incorporators?

A. Technically, no. I think the record will show that.

Q. Do you know what the purpose of Capital Service Incorporated was when it was formed?

A. Yes. [196]

Q. What was that purpose?

A. The purpose of investing in deals that we thought might develop and work into profitable situations we could make a profit on.

Q. What led you to believe that such would justify the formation of a corporation?

A. Well, observations from our experience in the security business.

Q. What were some of those observations?

(Testimony of G. Brashears.)

A. You mean specifically or generally.

Q. Generally speaking. What did you have in mind?

A. Well, we had in mind—We had seen several deals that had needed a small amount of capital at times; we felt if they were supplied capital, they might work into profitable operations.

Q. Did you know of any such company that had been supplied with capital, and would get into operations?

A. Well, we went into one deal previous to that—G. Brashears and Company.

Q. And you formed Capital Service, you say, for the purpose of doing that as its business?

A. Yes. Specifically at that time, we were in contact with this Inland deal. We had some talks regarding it; and we had taken, I think, one step in loaning them money, or something of that kind. Also with Timm Aircraft. And we [197] had the formation of Capital Service Corporation so that we could loan small amounts of money.

Q. You were familiar with the Capital Service negotiations with Central California Utilities?

A. Yes, generally speaking.

Q. Did you know how much money was to be advanced by Capital Service? A. Yes.

Q. Did you know the purposes for which that money was to be spent?

A. Generally speaking.

(Testimony of G. Brashears.)

Q. Did you know what the prospects were of getting that advance back? A. No.

Q. Why did you make or authorize the advance of \$20,000.00?

A. Well, I don't know if I personally authorized it. It was done with the idea that the company had a valuable opportunity through its Certificate of Necessity and franchise to build up a situation that might be either financed with the public, or sold to somebody who might be interested in it after it had been somewhat rehabilitated.

Q. And the purpose was to put it in some such shape? A. That's right.

Q. Was there any intention by you of recouping your [198] \$20,000.00 advance from the operation of the company as it then existed?

Mr. Maiden: If the Court please, I object to it as leading.

The Court: Objection sustained.

Mr. Maiden: The question before that is leading. There has been several leading questions, but in an effort to save time, I am trying to hold my objections to a minimum.

By Mr. Walker:

Q. What were the business reasons of making the advance of \$20,000.00?

A. We thought we could put it in some shape to make a profit on it.

Mr. Maiden: That's always a reasonable business deal.

(Testimony of G. Brashears.)

The Witness: That's right.

By Mr. Walker:

Q. Did you advance any additional money after the \$20,000.00? A. Yes.

Q. And when was that?

A. I can't give you the dates. The books will show that.

Q. I believe that has been stipulated as part of the record. Were the additional advances made for the same purpose?

A. The same general purpose, yes. I think it was some [199] \$14,000.00.

Q. What state of mind did you have with reference to the return of that money?

Mr. Maiden: I object to that, if your Honor please.

The Court: Sustained as to form.

By Mr. Walker:

Q. Did you have any state of mind when the money was advanced with reference to its repayment? A. Yes.

Q. Was that state of mind—I think we better withdraw that last question and answer. How long, Mr. Brashears, did you feel that you had made a wise decision?

Mr. Maiden: If the Court please, I object to that as calling for a conclusion of the witness on an ultimate question of fact solely within the jurisdiction of this Court.

The Court: Sustained.

(Testimony of G. Brashears.)

By Mr. Walker:

Q. Well, you have stated, Mr. Brashears, that when you made the advance in 1936, and later, that you did so because you hoped to recoup a profit of it, is that correct?

A. That's right. We were in the business of making loans for the sake of business only.

Q. Did you ever change your mind as to whether you could make a profit out of it? A. Yes.

Q. When was that?

A. When we charged it off.

Mr. Maiden: What was that?

The Witness: When we charged it off.

By Mr. Walker:

Q. Why did you change your mind?

A. Because we had been unable to do anything with it.

Q. Why had you been unable to do anything with it?

A. Well, the war came along and things tightened up, and the opportunities for raising capital for such deals became almost impossible.

Q. What had you planned?

A. If we had been able to raise the capital, I doubt if we would have been able to get any material.

Q. Did you have any intention of putting up any more money of your own?

Mr. Maiden: If your Honor please, I object to

(Testimony of G. Brashears.)

the expression what his intentions were. I want him to tell what he did.

The Court: Sustained.

By Mr. Walker:

Q. Have you had occasion to examine the minute book of the Capital Service Company?

A. Yes.

Q. Do those minutes show any action taken by the Board [201] of Directors with reference to a decision regarding money being advanced to Central California Utilities?

A. You mean further money? No. I haven't been able to find it.

Q. And how recently have you examined those minutes?

A. I just went over it this morning.

Q. Is the minute book in the courtroom?

A. Yes.

Q. As a Director of Capital Service Incorporated, did you have occasion to consider whether additional money should be put into Central California Utility project?

A. Yes. It was considered over a period of years.

Q. Was it ever decided to put more money?

A. You mean after when?

Q. After '37.

A. When did we put the last money in?

Q. The last money was in 1937.

(Testimony of G. Brashears.)

A. We took it up numerous times. We weren't in a position to put the money in.

Q. Why weren't you?

A. We had several other deals, a couple of other deals that required, in order to keep them alive, much smaller amounts of money than would have been required to do a real job on Central California Utilities.

Q. What were these other projects? [202]

A. One of them was Timm Aircraft, and the other was the bakery project which started as Ful-Ton Truck.

Mr. Maiden: You are speaking now in your capacity as a Director and President of Petitioner, Capital Service Incorporated, is that right?

Mr. Walker: I believe the witness has stated he was a Director of Capital Service Incorporated, not the President.

Mr. Maiden: But you are not talking about what G. Brashears did too, are you?

Mr. Walker: The questions have related to Capital Service.

Mr. Maiden: All right.

By Mr. Walker:

Q. Do you know why that money was borrowed?

Mr. Maiden: Just answer yes or no.

The Witness: Yes.

By Mr. Walker:

Q. As a Director of Capital Service Incorporated, do you know what disposition was made

(Testimony of G. Brashears.)

of that money? A. The books would show it.

Q. You have heard Harry Moore testify this morning that the sums of money which he mentioned were borrowed by Capital Service Incorporated from G. Brashears and Company from 1937, all with the balances shown; can you state whether the proceeds of this loan from G. Brashears and Company were [203] spent in these projects that you mentioned? A. Yes, the majority of them.

Q. Can you state why such money was not spent on the Central California Utilities project?

A. In the first place, there wasn't enough to do anything with Central California Utilities. In the second place——

Q. Did you feel—Pardon me. I didn't mean to interrupt.

A. In the second place, the other deals were such that we would have lost them, we felt, if we wouldn't put in some money; and we didn't feel that we would lose the Certificate of Necessity on the Central California Utilities by awaiting such time as we could, either to dispose of it as a whole, or finance it in such a way as to do the job that was necessary.

Q. Why did you feel——

A. There was different sizes of money that was necessary between Central California Utilities and the other two deals.

Q. Why did you feel that the Central California Utilities would not be endangered——

(Testimony of G. Brashears.)

Mr. Maiden: If your Honor please, I object to that. The witness has just stated what he thought. I want facts.

The Court: Objection sustained.

By Mr. Walker:

Q. Did you have a reason for deciding that—I will [204] withdraw that question.

A. Do you want me to state the facts of the case?

Q. I want you to state the facts that you know as to why the decision was made to put the money borrowed from G. Brashears and Company into the Timm Aircraft and into the bakery, rather than into the Central California Utilities.

Mr. Maiden: G. Brashears? I thought you were talking about Capital Service.

Mr. Walker: The money borrowed from Capital Service from G. Brashears.

Mr. Maiden: I've got no objection. Go on, tell the story, Mr. Brashears. We've got to get through with this.

The Witness: Well the record will bear out our judgment; at the time, we were required to decide, times weren't so good and we had three principal deals. We had to decide which ones we could hold on to best for the least amount of money, and we felt that the Central California Utilities was principally dependent upon the Certificate of Necessity and franchise, and in order to substantiate the value, or a sale of the project, we felt that that was all

(Testimony of G. Brashears.)

we had to hang on to; and the others, if we hadn't put small amounts of money into, we would have lost entirely.

The other two deals have come out fairly well, and that is on the record. The Revenue Department has gone over all our books and records. [205]

By Mr. Walker:

Q. You have stated that you had hoped to either refinance this utility project or sell it.

Mr. Maiden: If the Court please, I don't know whether he testified to that or not. I object to what he hoped to do, and I want to know facts.

Mr. Walker: I think the state of a man's mind, if the Court please, is a fact.

Mr. Maiden: I know what his state of mind is today, but I don't know what his state of mind was back in 1939.

Mr. Walker: That is what we are getting at.

Mr. Maiden: The actions of this corporation will be shown by their official records. If you want to keep insisting on going into this, I am going to demand that you present your proper records which will show what actions were taken.

Mr. Walker: I believe the record before the Court already shows the dollars and cents that changed hands, and why. I think it is also very pertinent for the Court to know what the state of mind was of the man who made the decision in this matter. I think his state of mind is very definitely fact.

(Testimony of G. Brashears.)

The Court: May I suggest, counsel, a corporation speaks from its records, and that is the best evidence. The state of mind of an individual, even though he may be a Director here in connection with that corporation does not [206] reflect the corporation. I want to give counsel for the Petitioner full opportunity to present his case, but from a witness of this kind, who is not an expert witness as I understand it, the things to be elicited is what was done and why, if the witness knows.

If we can confine ourselves along that general line, we may save some time and stay within the rules of evidence.

By Mr. Walker:

Q. Mr. Brashears, I show you from the stipulation, Joint Exhibit 8-H, and show you the last two entries of that exhibit entitled, "Settlement of Shell Oil" and "Sale of pipe" and ask you if that is your handwriting? A. Yes.

Q. I point out, also to you, on the record, that the balance in the account receivable owing to Capital Service by Central California Utilities was charged off to profit and loss on December 31, 1942. Are you familiar with that charge off?

A. Yes.

Q. Could you say why that was done?

A. The Certificate of Necessity had been canceled by the Railroad Commission in October of 1942.

(Testimony of G. Brashears.)

Q. Did you have anything to do with the cancellation of the certificate?

A. The cancellation came from the Railroad Commission. [207] We had stated in a letter at some time previous that we could not—I think the letter is there. I think it will show.

Q. I show you Petitioner's Exhibit 37, and ask you if you have seen that before?

A. Yes. It is a copy——

Q. This is a copy of the letter to the Railroad Commission. Did you have anything to do with the writing of that letter?

A. Not the actual writing. I had to do with the decision that it should be written.

Q. And what did you have to do with that decision?

A. It was my recommendation they so advise the Commission.

Q. And why was that?

A. Because I didn't think we had any reasonable opportunity, any further reason to hang on to the Certificate of Necessity, and to finance the deal or sell it.

Q. What led you to that conclusion?

A. Times, general conditions, conditions of the Capital Service Company. The war came along as I have just stated. It was tough to do anything.

Q. Do you remember conferring about this matter with anyone else? A. Yes.

Q. Who did you confer with?

(Testimony of G. Brashears.)

A. I conferred with Mr. Price for one. Probably all the [208] other directors.

Mr. Maiden: Was that at an official meeting of the Board of Directors?

The Witness: We didn't always decide such things at official meetings. The majority of the Board was close together, and if we would come to a decision of the majority of the Board, we would proceed.

Mr. Maiden: Then, you would have minutes written up, wouldn't you?

The Witness: Sometimes. Sometimes.

Mr. Walker: I'll be through in just a minute, counsel.

By Mr. Walker:

Q. You stated that the Timm Aircraft was one of the projects which Capital Service had been interested in, is that correct? The Timm Aircraft, is that one of the projects? A. Yes.

Q. Did Capital Service own stock of Timm Aircraft? A. Yes.

Q. And had Capital Service loaned money to Trimm Aircraft? A. Yes.

Q. Do you know how Capital Service came out with the Timm Aircraft?

A. They made a little money. [209]

Q. How was that made? A. Sale of stock.

Q. Do you recall when that was?

A. Exactly no. The books would show.

Mr. Walker: No further questions.

(Testimony of G. Brashears.)

Cross-Examination

By Mr. Maiden:

Q. Mr. Brashears, am I pronouncing that name correct? A. Yes, that's right.

Q. I hate to mispronounce people's names. That's kind of a stumble for a country boy from Tennessee, I'll tell you, right now.

A. How long?

Q. Not long. Mr. Brashears, this Brashears and Company, would you give the Court some idea of the volume of business, the volume of investments, made by your company back in 1935?

A. I haven't that kind of memory. We have books and records. We can bring them up and show them to you. Your department has been over.

Q. Were the operations large or small?

A. Comparatively small.

Q. Comparatively small? A. Yes.

Q. It isn't considered to be a large securities and investment company? [210]

A. I shouldn't think so.

Q. Well, do you have any idea of it; just give us a rough idea of the volume of your financial transactions in 1940 and 1941?

A. I couldn't do that.

Q. You don't have the slightest idea?

A. I have some idea.

Q. Well, give us your best recollection?

A. I have a balance sheet here, I think, an earnings sheet.

(Testimony of G. Brashears.)

Q. That will be satisfactory.

A. Not of 1940. I can send for that. This is one of 1948. That isn't one of 1940. We will have to send up to the office to get it.

Mr. Maiden: I am going to get his best recollection.

By Mr. Maiden:

Q. Mr. Brashears, what connection did you have with this company in 1940 and 1941?

A. Which company?

Q. The G. Brashears Company?

A. I was Director and an officer.

Q. Director and an officer. What officer?

A. President.

Q. Now then, as President and Director of that corporation in 1940 and 1941, do you mean to tell this Court that you [211] don't have any recollection at all or any knowledge at all without looking at books and records as to the approximate volume of the financial transactions your company was in?

A. Not that I would care to state on the stand, no. When the actual facts are available. I have the balance sheet here.

Q. Well, that is for 1948. But you don't care to give this Court a statement with regard to the financial condition of the company in '40 and '41?

A. You mean the G. Brashears and Company?

Q. Yes.

A. No. Not without the records before me which are available. They are available.

(Testimony of G. Brashears.)

Q. Well, where are they?

A. They are at our office right up the street where we can get them in fifteen minutes. You want the facts, don't you?

Q. Well, I just want a rough approximation.

A. I wouldn't testify to amounts and details that far back with memory.

The Court: May I suggest that you haven't been asked amounts and dates.

The Witness: Yes.

The Court: The only question you have been asked is the general scope and extent of what the business was in a [212] general way. That is all the questions that is propounded to the witness.

The Witness: Well, your Honor, our business is one that varies greatly, and I prefer not to testify the amount of business. I have a balance sheet here. I could have brought the profit and loss statement, which I didn't think would be necessary. Our entire records are available in fifteen minutes time.

The Court: I understand that; but that isn't the question in this case.

By Mr. Maiden:

Q. The balance sheet that you have there is 1948, I believe? A. That's right.

Q. Mr. Brashears, I believe that in the reorganization of Inland Land Company, that the G. Brashears Company received promotional stock in the California Utilities Corporation, the debtor corporation; they are partners in this case, is that right?

(Testimony of G. Brashears.)

A. I don't believe so. I think it was Capital Service.

Q. Do you mean to tell me, G. Brashears did not own any promotional stock in California Utilities Corporation?

A. I don't believe so. G. Brashears and Company?

Q. Yes.

A. I don't believe so. It was Capital Service.

The Court: This is Capital Service.

The Witness: Capital Service had. We are not talking about G. Brashears and Company.

By Mr. Maiden:

Q. Well, didn't G. Brashears and Company have some interest in Capital Service? A. Yes.

Q. What was that interest?

A. When? Now or then?

Q. Then.

A. It owned all of the common stock, the B stock, so classified, of Capital Service Company. It owns now——

Q. I don't care about now.

A. Well, let me try to answer this, will you?

Q. All right.

A. It owns now a trifle better than 50 per cent of the A, and it owns something less than that—What date are you talking about?

Q. I want to know back in '35, '36, '37, '38 and '39.

(Testimony of G. Brashears.)

A. I would say that all I know we owned at that time was the B stock, and 100 per cent of the B stock was controlled by the company.

Q. Was that promotional stock? A. Yes.

Q. And you hadn't paid anything for it? [214]

A. Not directly. We paid something in the way of services and expenses.

Q. In organizing, is that right?

A. That's right.

Q. So that all of the money that was advanced to the California Utilities Corporation came from Capital Service Incorporated, is that right?

A. Directly, yes, but some of it was supplied through G. Brashears and Company loan.

Q. Now, and G. Brashears and Company didn't have any of this money directly in this project?

A. No. It made loans to Capital Service.

Q. Now, I believe this record shows that G. Brashears and Company never directly invested any money in the California Utilities Corporation, isn't that correct?

A. I don't think so, no. I think at the beginning, my memory is at the beginning, G. Brashears and Company put a small amount of money in while Capital Service was being organized.

Q. But Capital Service repaid you that money?

A. That's right.

Mr. Maiden: I believe that's all.

The Court: Anything further from this witness?

Mr. Walker: Nothing from Petitioner.

The Court: You may stand aside.

(Witness excused.) [215]

Mr. Walker: If the Court please, the Petitioner has just recently found it desirable to produce another witness which is in the courtroom now, but we haven't really had an opportunity to confer with him, and I would like to suggest that with the Court's leave, we have a short time to do so prior to putting him on. It won't take long. Will it be agreeable to the Court to put our witness on at 1:30 this afternoon?

The Court: Off the record.

(Discussion off the record.)

The Court: We will take a short recess.

(Short recess taken.)

The Court: Call your next witness.

Mr. Walker: Mr. Wood, who has entered his appearance for Petitioner will interrogate the next witness.

Whereupon,

ROY M. BAUER

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wood:

Q. Will you state your name and address, please?

(Testimony of Roy M. Bauer.)

A. Roy M. Bauer, 810 South Flower Street, Los Angeles.

Q. Who are your employers now, Mr. Bauer?

A. I work for three companies. The Southern California Gas Company. Southern Counties Gas Company. Pacific Lighting Corporation. All at that address.

Q. And your title, please?

A. Presently, I am gas supply supervisor.

Q. Will you describe your education and experience prior to coming with your present employers?

A. I graduated in 1920 from the University of California at Berkeley. Shortly thereafter, I worked in the Southern County Gas and Oil Fields for a period of time. I then returned to the university to take post-graduate work in natural gas and petroleum engineering.

I then became associated with the engineering staff of the California Railroad Commission, which has since become the Public Utilities Commission of California.

During my period, for approximately three years and a half, I had to do with service investigations, rate matters, valuation matters, checking into new areas of distribution, new areas of supply and consolidation of statistics.

Q. Of what? A. Natural gas entirely.

Q. Would you describe the duties that you have, and have had in your present association with your employers?

(Testimony of Roy M. Bauer.)

A. Since September 1931, I have worked for the three corporations mentioned. I originally had charge of all gas [217] dispatching operations. My work has been enlarged considerably in recent years to that. Not only gas dispatching operations, gas supply operations, watching the development in all areas of California for new sources of supply. Make forecasts, and investigating of new market areas. Testifying for the Public Utilities Commission in various cases, franchise cases. Cases such as were held last year in the investigation of production utilization of natural gas. California Case 45991, before the Public Utilities Commission.

I have made some reports on underground storage, and testified before the Federal District Court of Southern California about a year-and-a-half ago in one condemnation case.

I testified before the Federal Power Commission relative to bring natural gas to California.

Prior to 1931, I was with the Southern California Gas Company, and several predecessor companies.

In one year, I held the title of Rate and Appraisal Engineer. I also testified in those earlier years a number of times in rate litigations and valuation litigations.

Q. In connection with those duties, did you have occasion to appraise and value for prospective profit purposes, franchises in the State of California, for the transportation of natural gas?

(Testimony of Roy M. Bauer.)

A. Yes, I investigated several cases. In fact, off-hand, [218] I can recall I was complaint witness in three or four franchise cases. There was one at Corcoran some years ago. There was another one located at Newhall. And the most recent one last year was at Riverside.

Q. Have you been employed by the company in connection with the obtaining of these certificates of convenience and necessity to the transportation of natural gas in California, and the maintenance of those as to the wisdom of abandoning those certificates?

A. As I said, I was interested in several cases in helping obtain franchises for the company, and made investigations in that area which would justify the installation of pipe lines and pertinent facilities to supply customers.

As far as abandoning was concerned, I can't recall that we have abandoned any in recent years.

Some years ago, we had occasion to look at a long pipe line that was serving customers, and there was lack of gas, and service was ultimately abandoned.

Q. Are you familiar with the transportation of natural gas in the San Joaquin Valley, especially Kings County and Fresno County, and the sources of gas supply of the companies that distribute it? Would you answer yes or no? A. Yes.

Q. What experience have you had to gain that familiarity?

A. Practically ever since I came to the company,

(Testimony of Roy M. Bauer.)

as I [219] testified, I have been in charge of gas dispatching operations, and in recent years, with the complexities of supplies and transportation of various areas in California, I have been more closely connected with that.

Every day, in fact, I followed operations in all the focal areas in Southern California, and issued the necessary instructions and procedures to see that all customers are supplied with gas at all times.

Q. In that area?

A. Also in that area. The Southern California Companies supply up to Fresno.

Q. I would like to ask you a hypothetical question, assuming certain facts. Assume that on January 1, 1942, that a corporation is the holder of a certificate of convenience and necessity from the State of California to obtain and distribute natural gas in Kings and Fresno County, California; and assume that the corporation has no employees, it has no physical assets or cash. It has a small debt, under \$10,000.00. It has no office. It does, however, have the possibility of raising funds or either through of public financing or private financing; and assuming also for purposes of the question, that it has a source of gas supply at prices and at quantities that would be profitable to resell. And assume that there are customers, potential supply customers in that area. Have you an opinion as to the monetary value of that certificate of [220] convenience and necessity?

(Testimony of Roy M. Bauer.)

Mr. Maiden: Just a moment, if the Court please, a hypothetical question should be based upon facts in the record. Now the counsel for Petitioner in two specific instances, I think, had stepped beyond the record. One is, he has asked him to assume they had a gas supply as of January 1, 1942, is that right?

Mr. Wood: That's right.

Mr. Maiden: The record in this case shows that this company had no gas supply from 1937 on. That has been the testimony of a witness. He has also asked him to assume that they had hope as of January 1, 1942, of obtaining financing—Was it financing?

Mr. Wood: Financing.

Mr. Maiden: Obtaining financing.

Mr. Wood: Raising money.

Mr. Maiden: Raising money.

Mr. Wood: And "possibility" not "hopes."

Mr. Maiden: And possibilities of raising money. I think this record shows, if the Court please, that I think it is the clear evidence in the case that any possibility, alleged possibility, that this company may have had for obtaining finances, had expired as of December 31, 1941. And I submit that the hypothetical question should be corrected so as to properly state the record in that connection, before asking [221] the witness his opinion.

The Court: The objection will be overruled. The weight to be given the witness' testimony in a case

(Testimony of Roy M. Bauer.)

of this kind will depend entirely upon the assumed facts in the question, being a matter of record.

Mr. Maiden: Thank you, your Honor.

The Court: And that will be measured, of course, by the facts of record when it comes to a determination of the weight to be given this witness' answer. You may answer.

The Witness: Yes, I have an opinion.

By Mr. Wood:

Q. First of all, an opinion as to the monetary value. Will you state your opinion as to the monetary value?

A. I am unable to give you an actual dollars and cents value without knowing the facts of the case, it depending upon whether the operations are large or relatively small. It depends whether the operations show large profit, or whether they show less than the customary 6 per cent which is generally allowed public utilities corporations by the Commission in this State. It definitely has a potential value.

Q. Assuming those same facts, have you an opinion as to the value monetary or otherwise of the certificate of convenience and necessity at January 1, 1942.

Mr. Maiden: I would like to know what other fact he has assumed here. I just want to know where I am with regard to [222] the questions and answers.

Mr. Wood: Assuming the same facts that I gave at the beginning.

(Testimony of Roy M. Bauer.)

Mr. Maiden: And I want to know what additional facts you would have to assume. I believe you stated that you would have to know something.

Mr. Wood: As to the monetary value.

Mr. Maiden: What are the facts?

The Witness: May I have the question read?

(The question was read.)

The Witness: In my opinion it would have value because a certificate of public convenience and necessity is a prerequisite to the lawful operation of a public utility company. The Commission in this State wouldn't permit you to serve an area without a certificate, and the Commission has said on several occasions also——

Mr. Maiden: Your Honor, that is a matter of law, and I object to it.

The Court: The answer as he gave it is not responsive to the case.

(The question was read.)

Mr. Maiden: Your Honor, I think the witness ought to explain what he thinks, by otherwise, that is too broad and general.

The Court: Could not that be a matter for cross-examination? [223]

Mr. Maiden: Yes, it would, your Honor. I withdraw the objection.

The Court: The answer called for by that question is yes or no.

(Testimony of Roy M. Bauer.)

By Mr. Wood:

Q. The answer is yes or no. A. Yes.

Q. I repeat. I have already asked this same question. Would you state your opinion?

A. My opinion is that a company having a certificate of public convenience and necessity does have a potential value there if the facts as you have stated them are correct.

The Court: The question propounded to the witness was, what is that value.

Mr. Wood: It has a value monetary or otherwise.

The Court: He has answered that?

Mr. Wood: He has answered it has a value, potential value.

By Mr. Wood:

Q. Would you explain what you mean by potential value?

A. As I said previously, before a corporation can provide service in any area, they must have a certificate of public convenience and necessity. If two corporations were attempting to supply a certain area, and one had the franchise [224] and the supply as you have indicated, obviously they would be the ones that would take over the distribution of gas. Under those conditions, in my opinion, the certificate does have value.

(Discussion off the record.)

(The question was read.)

(Discussion off the record.)

(Testimony of Roy M. Bauer.)

The Court: Very well. On the record.

Mr. Wood: If your Honor please. I would like very much. I don't quite understand.

The Court: You will proceed in your own way.
By Mr. Wood:

Q. Take the same set of facts that existed January 1, 1942, and altering one fact as to the source of gas supply, and assuming that during the year 1942, the source of gas supply, that is any source or sources of gas of this company are diminished to the point that it is either impossible to obtain gas, or possible to obtain it only at prohibitive prices. Assuming that change of conditions during the year 1942. Have you an opinion as to the value of that certificate, as to the value and its potential value? Yes or no. A. Yes.

Q. Would you as an expert based on those facts, state your opinion as to the value or potential value of that certificate? [225]

(The question was read.)

The Witness: If there is little or no gas supply——

The Court: The question is just to state your opinion as to value. That is the question you are to answer.

Mr. Wood: I would like to withdraw that question, if your Honor please. I will start out first and ask this of the witness.

By Mr. Wood:

(Testimony of Roy M. Bauer.)

Q. Has this certificate a value, or potential value? Answer yes or no.

Mr. Maiden: I want to know when?

Mr. Wood: This is after the change of conditions in 1942, in this hypothetical set of facts. One condition being changed that the source of gas supply is infeasible and impossible to get and no longer economical, that is during the year 1942, after this change.

Mr. Maiden: In other words, you are asking him to assume that they had gas supply up to January 1, 1942, and then after January 1, 1942, you are asking him to assume that they had no gas supply, is that right?

Mr. Wood: Yes. Not quite as flatly as that, but that is the substance of it. It was either not available or not economical.

The Court: Gentlemen, let's proceed.

By Mr. Wood:

Q. Has it a value? [226]

A. No, I do not think so.

Q. Has it a potential value?

A. No, I do not think so.

Q. What is the basis of your opinion that it has no value or potential value?

A. The condition that you stated, namely that there is no supply available under any conditions, and without a supply of any kind, obviously a corporation could not function.

(Testimony of Roy M. Bauer.)

Q. The question was not under any conditions. It was either cut off or a tightening of the supply to the degree that it was no longer economical to obtain the supply either through high price or Government restriction. That is, the supply practically disappeared as a practical matter.

A. Well, if there was no supply, it would have in my opinion, no value. If there was a very small supply under the conditions with which it would be uneconomical to operate, it would have perhaps a very small value.

The Court: It would have a value?

The Witness: It would have a very small value.

The Court: For commercial purposes, is that what you mean to say?

The Witness: That's right.

The Court: Little or no value under those conditions.

By Mr. Wood:

Q. You stated that you are familiar with the distribution [227] of natural gas by commercial companies in Kings and Fresno County and the San Joaquin Valley in general. You are familiar with the sources of supply in that area, of the natural gas that is being distributed. Did you have that same familiarity at the beginning, as to conditions at the beginning of 1942?

A. Yes. I have been thoroughly conversant with that area for at least fifteen years.

Q. Have you ever heard of the Gas Fuel Service Company?

(Testimony of Roy M. Bauer.)

A. Yes, I did hear of them some years ago.

Q. Are you familiar with the location of the company and the nature of its operations?

A. Only generally.

Q. Would you describe the conditions in the San Joaquin Valley in general, and Kings and Fresno County in particular, as to the ability of a commercial gas company to obtain a source of supply, coming into the valley, and not having the source of supply before that?

Mr. Maiden: Your Honor, I think he ought to confine it to this Petitioner. We don't care what some other company might have done.

The Court: The objection is sustained. The question is directed to bringing a source of gas in that can be brought in any place into any community.

By Mr. Wood:

Q. Would the Gas Fuel Service Company be able to obtain [228] gas at commercial prices and in commercial quantities for distribution in Kings and San Joaquin County at the beginning of 1942; would it have such sources of supply?

Mr. Maiden: If your Honor please, I don't know that the witness has testified that he knows anything about the operations of Capital Service Company.

The Court: If the witness knows of his own knowledge.

(Testimony of Roy M. Bauer.)

The Witness: I can state that the gas companies in actual operations at that time had all the sources of supply——

The Court: Just a moment. Read the question please.

(The question was read.)

Mr. Maiden: I object to that, your Honor, because this witness hasn't shown that he knows anything about the Gas Fuel and Service Company as of January 1, 1942, and obviously one company might be able to get gas whereas another company might not be able to get gas, such as the company we have here.

The Court: If the witness knows of his own knowledge as to the particular company, it is competent testimony, otherwise not.

The Witness: I have no direct knowledge of the Gas Fuel Service Company as of that particular date.

The Court: Very well.

By Mr. Wood:

Q. On January 1, 1942, were there sources of gas supply for distribution in Kings and Fresno County for commercial [229] companies?

A. There were.

Q. Were there also sources for companies that had not been in operation, or about to go into operation?

Mr. Maiden: Your Honor, I object to that as being entirely too speculative.

(Testimony of Roy M. Bauer.)

The Court: Objection sustained.

By Mr. Wood:

Q. First of all, were there any changes during the year 1942, in the sources of gas supply available for distribution by companies in Fresno and Kings County? . A. Yes, there were.

Q. Would you describe those changes?

A. The first major repressuring in California started in 1942 at Kettleman Hill oil fields and increased rapidly so that by December, as I recall, about ninety million cubic feet daily were returned to the underground structures.

Q. If I may interrupt, how does Kettleman Hills tie into Fresno and Kings County? What connection does it have?

A. Kettleman Hills is largely in Kings County and is the major oil and gas field in the upper end of the San Joaquin Valley. This took gas away from current buyers for distribution, and naturally reduced materially the gas available to gas companies use of this major source of supply.

As far as utilization of gas is concerned, the [230] major operators at that time were called upon to produce all the oil that it was possible to produce in order to take care of the mounting demands of war industries, and more particularly, the increased demands of the armed forces. That required the gas companies to avail themselves of every foot of commercial gas production to which they could con-

(Testimony of Roy M. Bauer.)

nect their facilities in order to meet this increased market demand, which continued through the war period.

Q. How much of this took place in the year 1942; how much of this change?

A. I can't recall definitely without referring to charts, but Pearl Harbor occurred in December, 1941, and it was within a short period that industry started to increase; so I would say that during the year 1942, the effect of the war effort was very noticeable in the fuel demands in California.

Q. I would like to ask one more hypothetical question. Assuming the same set of facts as in the first question. Do you recall those facts, or would you rather that I go over them?

A. I believe I recall them.

Q. Assuming the conditions as to the source of gas supply would be as you have testified to here; have you an opinion as to the value of the certificate at the beginning of 1942, and at the end of 1942, after this change has taken place? Answer yes or no.

A. Yes, I have an opinion. [231]

Q. Would there be a change in the value? Answer yes or no.

A. Yes, there would.

Q. What would that change be in your opinion as an expert?

A. It would be a material reduction in value under the conditions that you set forth.

Q. Would you explain what you mean by a material reduction in value?

(Testimony of Roy M. Bauer.)

A. I can't place a monetary value on it specifically. As I said previously, one would have to know the exact circumstances under which the corporation operated. But at the beginning of the year with a gas supply in prospect, and customers in prospect, and a franchise to supply those customers, in my opinion, the franchise does have some value. On the other hand, if there is no assurance or little assurance or the supply is uneconomical, it has little or no value.

Q. It has little or no value, you say?

A. That is my opinion.

Q. Have you any opinion as to whether at the end of 1942, it would be worthless for all practical purposes? Yes or no.

Mr. Maiden: Your Honor, I object to that as leading.

The Court: Objection sustained. [232]

By Mr. Wood:

Q. Would you explain what you mean by little or no value?

The Court: Hasn't the witness been over that? I don't want to take anything away that counsel has, but it seems to me we are getting no place in this examination of this witness as an expert. If you have anything specific and definite, go ahead and proceed.

By Mr. Walker:

Q. May I ask the witness one or two questions? Mr. Bauer, assume the set of hypothetical facts

(Testimony of Roy M. Bauer.)

which were stated at the outset being the facts with reference to corporation A, and assume the same facts as having been stated with respect to corporation B, except that as to corporation B there was no certificate of convenience and necessity, can you state whether your opinion of value would differ as between corporation A and corporation B?

A. Yes, it would.

Q. Which corporation, in your opinion, would have the greater value?

A. The corporation having the franchise certificate, which I understood was the A.

Q. In your experience in the gas field, and in your experience in connection with the certificate of convenience and necessity, can you tell the Court what your experience has [233] been with reference to the granting of those certificates to a corporation seeking it in an area where a certificate is already outstanding?

Mr. Maiden: Your Honor, I think that involves a matter for the Utilities Commission, and not for this witness. It is purely speculative.

The Court: This witness hasn't shown any expert knowledge in this particular line. Is there anything further gentlemen?

Mr. Walker: No further questions.

The Court: You may step down.

(Witness excused.)

The Court: How long do you expect to take with cross-examination?

Mr. Maiden: Your Honor, I believe I can do it in thirty minutes.

The Court: Has counsel for Petitioner any further testimony?

Mr. Walker: None at all, your Honor.

The Court: We'll suspend until 1:30.

(Whereupon at 12:00 o'clock noon, a recess was taken until 1:30 p.m. of the same day.)

Afternoon Session

1:30 P.M.

The Court: You may proceed.

Whereupon,

ROY M. BAUER,

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination

(Continued)

By Mr. Maiden:

Q. Mr. Bauer, I believe you stated that at one time you served with the Railroad Commission which is now the Public Utilities Commission of California? A. That is right.

Q. I believe you stated that you have been with your present company since 1931.

A. In the capacity of gas supervisor. I have been with predecessor gas companies now incor-

(Testimony of Roy M. Bauer.)

porated into Southern California Gas Company since 1924.

Q. Then your service with the Commission was prior to—would be prior to 1931?

A. Yes. It was the period 1921, '22, '23 and '24.

Q. Now, you have been asked to express an opinion on the basis of some assumed facts. I want to ask you first, when were you first contacted by counsel in this case with respect to your testimony today? [235]

A. This morning.

Q. This morning? A. Yes, sir.

Q. Prior to the discussion that you had with your counsel before you went on the stand did you have any personal knowledge of the operations of the Capital Service, Inc.—I mean, of the Central California Utilities Corporation, the Kettleman-Lakeview Oil Company or the Gas Fuel Oil Company from 1936 up to January 1, 1942?

A. I had knowledge of the operations generally of the Gas Fuel Service Company, and there was also some drilling concern—I believe you mentioned one—that had certain operations in the Dudley Rich Field, which I had knowledge of.

Q. Was that knowledge gleaned from observation, going out there and seeing them drill and asking them who was drilling?

A. Mostly from contacts through our field people. I did travel through the territory once.

Q. You did travel through the territory?

(Testimony of Roy M. Bauer.)

A. Yes.

Q. How much pipe line and equipment and how many customers, if you know, did the Gas Fuel Service Company operate in Fresno County from the period 1936 up to January 1, 1942?

A. I can't recall offhand. It was a relatively small operation.

Q. But you do have knowledge of the fact that they did [236] operate pipe lines in Fresno County?

A. It is either Fresno or Kings. In the general area of Stratford, the town of Stratford.

Q. The town of Stratford? A. Yes.

Q. But you don't know whether they were actually operating their certificate of necessity in both the Counties of Fresno and Kings?

A. I can't recall from memory, no.

Q. Now, Mr. Bauer, you stated that a certificate of necessity was essential to a company such as we have here, that they couldn't operate without it. I will ask you if a certificate of necessity would be issued to a corporation to operate in a particular county without the corporation first having a franchise from the county. A. That is correct.

Q. In other words, they would first have to have a franchise before the Commission would issue a certificate of necessity? A. That is right.

Q. Now, I believe you were given another hypothetical question which wasn't based upon any facts in the case, as I understand, and that is: That assume on January 1, 1942 that company A had a

(Testimony of Roy M. Bauer.)

certificate of necessity to operate in a particular territory; that company B didn't have a certificate of necessity; [237] which one of those companies could operate or—do you recall that specific question? I think I have forgotten some of the details.

A. Yes, I do.

Q. Will you state it, if you recall it?

A. As I recall the question, it was which of two companies, A or B, could operate and supply the public with gas; one having a certificate and the other not having a certificate, and it was my opinion that the company A having the franchise and certificate was in a position to service the public in preference to the other company.

Q. Well now, let me ask you this question: Suppose too, company A had the certificate and was not an operating company, it was an inactive company; suppose that it didn't have any pipe lines or equipment of any kind; suppose that it had had that certificate of necessity for a—well, say at least seven or eight years; suppose that they didn't have and couldn't obtain sufficient finances to put in the pipe line equipment necessary to serve the customer; and suppose that they had no gas supply—which it could obtain.

Now, I am asking you on the other hand, assume that company B which did not have a certificate of necessity, but had the finances to equip a gas line sufficient to render the service; suppose that they did have gas available to them; and suppose this

(Testimony of Roy M. Bauer.)

company B applied to the Railroad Commissioner to revoke [238] the certificate of necessity of company A and grant them the certificate of necessity. Now, in your opinion, what would be the outcome?

A. If I were company A I would immediately proceed to acquire rights for gas, assuming that company B had gas available.

Q. Well, I know, but my question was that assuming company A couldn't get any gas.

A. Well, if they couldn't get any gas under any circumstances, obviously they wouldn't be in a position to supply the market.

Q. And the certificate of necessity would be granted to company B that could demonstrate its ability to give effect to the certificate of necessity? Isn't that right?

A. The second company would first have to have the franchise before they could apply for a certificate of convenience and necessity.

Q. Now then, assume they did have a franchise.

A. Well, under your hypothetical case, if company A had absolutely no possibility of getting gas, then there is a good possibility that company B would be given the leading position.

Q. The purpose of issuing those certificates of necessity is to have them utilized, isn't that right?

A. Yes. It is the exercise of rights that a company obtained from the public bodies like a county or municipality. [239]

(Testimony of Roy M. Bauer.)

Q. And the Commission wouldn't permit a company to hold one of those certificates out against all the world if the company failed to utilize the certificate, would it?

A. There might be a time limitation there. There is several possibilities that you would have to explore to give an exact answer. I would have to know the exact conditions under which you propounded your question.

Q. A certificate of necessity is issued to a company premised upon the proposition that that company is able and capable of utilizing that certificate of necessity, isn't that right?

A. That is the general premise, yes.

Q. The Railroad Commission—Public Utilities Commission would not issue a certificate of necessity to a company that didn't demonstrate that they could and would utilize that certificate. Isn't that right? I mean, just give the devil his dues.

A. That is correct. If there is no possibility in the future of obtaining any supplies.

Q. Now then, let's assume that as of January 31, 1941, that the holder of this certificate, the Gas Fuel Oil Company, did not have a gas supply and the probabilities of it getting a gas supply were practically negligible; assume that if it could have gotten a gas supply, but as of December 31, 1942 it could not obtain sufficient finances with which to utilize [240] the gas supply, that is, to put in operation the gas pipe line that they had authority

(Testimony of Roy M. Bauer.)

to operate; in that situation what would be your opinion as to the value of the certificate of necessity as of December 31, 1941?

A. You stated two dates. The first time you said December, 1942 and now you say December 31, 1941.

Q. Well, I meant December 31, 1941 to start with. I meant to have the same dates, you see.

A. I see. In my opinion it would have little or no value. That is the same question that was propounded by opposing counsel.

Q. Now, assuming that to be the case as of December 31, 1940, your answer would be the same?

A. Yes, upon the assumptions that you have stated.

Q. Now, assuming that that was true every year back until December 31, 1939, then your same opinion would prevail as of December 31, 1939?

A. Yes, with the understanding that there was no future possibility at any time of getting any gas to run the business.

Q. That is right.

Now, when you say "possibility" would you say just an iota of a possibility, just a scintilla of possibility would change your opinion any?

A. Yes, if there was the least possibility of getting gas there it would. [241]

Q. You mean just an infinitesimal possibility?

A. No, I wouldn't say that. Let's get down to facts. If there was a possibility of getting sufficient

(Testimony of Roy M. Bauer.)

gas to take care of the firm service that was required for the customers that were to be connected with the systems, then you would say, "Yes."

Q. Well, when you speak of the word, "possibility" do you mean substantial possibility, that is, a possibility based upon fact rather than hope in the mind of an individual?

A. Both, because in this oil and gas game in California there is always hope if you are within a certain general geographical area.

Q. But a hope and a reality or possibility might be two different things. Isn't that right?

A. Yes, that is right.

Q. Just because I hope I may be a millionaire don't mean that I will ever be a millionaire, does it?

A. Not necessarily.

Q. Now then, I believe you stated in answer to the hypothetical question put to you that before you could express any value—I mean, any opinion of monetary value or any other kind of value, as I understood, that you would have to know something about the operations of this company; whether it had been making a profit or whether it had been making losses. Isn't that true? [242]

A. Yes, that is right. I was referring to monetary value.

Q. Now, of course, you don't know what the profits or expenses of this company had been up to January 1, 1942, do you?

A. No, I had no opportunity of examining the records.

(Testimony of Roy M. Bauer.)

Q. Now, Mr. Bauer, have you had an opportunity to read the certificate of necessity that was granted this Gas Fuel Company?

A. No, I have not.

Q. You don't know what is in it?

A. No, I can't recall.

Q. Have you examined the franchises issued to this company from Kings and Fresno Counties?

A. I can't recall I have.

Q. Now, I want to ask you this question: This is just a heart-to-heart question on a fact so far as you may know it by reason of having dealt with the Railroad Commission, and I assume you have had dealings before, it is my belief, as a witness in certain cases. Let's say that a corporation——

Mr. Walker: May I interject at this point? If this witness is to be cross-examined on his knowledge of the functions of the Railroad Commission, that there will be no objection to my redirect examination also with this connection to the Railroad Commission. We have qualified him as a gas [243] expert, not as a student of the administrative procedures of the Commission. So if counsel wishes to get into that phase of it, I would like an opportunity to reexamine that phase.

Mr. Maiden: Well, I appreciate counsel's objection, and I don't care to push that point any further.

Mr. Walker: There is already one question in the record on that phase.

(Testimony of Roy M. Bauer.)

Mr. Maiden: Now, when you spoke about the value of a certificate of necessity owned by a corporation, was that based upon that company actually utilizing and operating that certificate of necessity?

The Witness: Yes.

Mr. Maiden: I believe that is all, if the Court please.

Mr. Walker: Just three questions, your Honor.

Redirect Examination

By Mr. Walker:

Q. Counsel has referred to the hypothetical question posed to you regarding corporations A and B, and he has asked you as to whether the certificate which A had would be supplanted by a certificate in favor of B if B had the gas supply and the money to lay the pipe. I will ask you then, assuming that A had the certificate to start with, if that certificate would be revoked without a hearing on the merits of their respective positions? [244]

A. No, a public hearing would be held under those conditions.

Mr. Maiden: Oh, I stipulate that.

By Mr. Walker:

Q. You have also stated on cross-examination that from 1939 onward the certificate would have had no value unless there had been a gas supply. I believe that is the general tenure of the examination. I would like to ask you if you have the same

(Testimony of Roy M. Bauer.)

opinion back as far as 1935 assuming—I think perhaps the best thing is to refer to the question that was asked.

Mr. Maiden: That will take a lot of time if you are going to find that question.

By Mr. Walker:

Q. If the corporation which has the certificate had no gas at the end of 1939 and you were pinned down to the scintilla of a possibility of it getting gas, you stated that there was substantially no value to the certificate or the company which held it. I will ask you to devote your attention to that same question, but taking the dates back to the end of 1935, and ask you hypothetically if a corporation which held a certificate and had no supply of gas, and nothing but the certificate, if the value at that date would be any different from the value you testified to as of 1939.

A. No, if there was no possibility of obtaining a supply.

Q. Do you know of the relative possibilities between [245] 1936 and the end of 1941 of the gas supply in Kings and Fresno Counties?

A. My recollection is that some additional fields were being developed in the northern end of Fresno County about that time, and Dudley Rich was gradually tapering in deliverability towards the end of the period you mentioned.

Q. Was gradually doing what?

A. Tapering in deliverability.

(Testimony of Roy M. Bauer.)

By Mr. Wood:

Q. In counsel's last question he asked you, in your answer to the original hypothetical question regarding the value of a certificate of necessity, if your opinion was based on the company operating it? That is a little vague. When you answered the question about the value of the certificate of necessity, was it necessary that there be operations at that time, or did you have in mind operations then or including prospective operations in the future, that is, the operating of it includes the possibility of future operation as well as present operation? I don't know if I make myself clear, except the question counsel asked, the last question on cross-examination, I felt was ambiguous in the respect that your question hinged upon the company operating under the certificate of necessity, and I asked, when you answered the question, did your answer depend upon the actual operation at that time, or did it also include the possibility of operating in the future if there [246] was a prospect of that future?

Mr. Maiden: If your Honor please, I think he ought to first ask this witness whether or not he understood my question. Now, he says that it is ambiguous, but I stated the question and he readily responded. Now, if the question wasn't ambiguous to him, I don't understand this question. I think it is objectionable.

(Testimony of Roy M. Bauer.)

The Court: Well, let's see what it develops. I can't tell at this time.

The Witness: I understood government counsel to say that the company was not operating and had no possibility or an infinitesimal possibility of supply.

By Mr. Wood:

Q. That isn't the question. His question, as I understand it, was with your regard to your answers to the first hypothetical questions and the assumed facts in those hypothetical questions were—there was no operation under the certificate of necessity at the time, and I wanted to bring out that your answer was based upon one of those assumed facts, that there was no operation under that certificate at the time that you placed the value on that certificate.

A. Yes, that is the way I understood it.

Mr. Maiden: Now, you are going to have to explain it to me, Mr. Witness, because I don't understand the question and I don't understand your answer. Now, here was the question [247] I asked you: I asked you whether your value that you spoke of as attaching to a certificate of necessity owned by a corporation was based upon the assumption that that corporation was active, an operating corporation utilizing the certificate. Now, what is your answer to that?

The Witness: Your Honor, I seem to be confused. There are apparently two sets of questions,

(Testimony of Roy M. Bauer.)

and I can't differentiate between one and the other. My original understanding to one of the questions was——

Mr. Maiden: Just a minute. Mr. Reporter, will you read my last question to him? I want that question answered.

(The record was read.)

The Witness: This is that hypothetical question you set forth?

Mr. Maiden: Yes. To which you answered, "Yes."

The Witness: If the corporation was an operating corporation that would be one thing, and if your question is directed solely at the premise that we start with an operating corporation, then the franchise value was considered on the basis of such an operating corporation.

Mr. Maiden: That is what you had in mind, then, when you spoke about the value of the certificate owned by a corporation, that that certificate had value in the operation by the corporation of the certificate?

The Witness: Yes, and I also stated if there was a good [248] possibility of getting a source of supply in the immediate future, that it would become operative, the answer was also yes.

Mr. Maiden: Now, I want you—were you still in your cross-examination?

Mr. Walker: No further questions on redirect.

(Testimony of Roy M. Bauer.)

Mr. Maiden: Just one question, your Honor, and I will be through, on my honor.

Recross-Examination

By Mr. Maiden:

Q. Mr. Bauer, you were asked by counsel on redirect examination to assume that the state of facts that I gave you as being the situation at the end of each of the years from 1939 to the end of 1942, the counsel asked you then whether under those same facts back as of December 31, 1935, your answer would be the same, and I believe you stated, "Yes." Do you recall that?

A. Yes, I recall that.

Q. Now, I want you, though, to assume this additional situation which actually existed in this case back at the end of December 31, 1935, and that is, that the company not only had a franchise, not only a certificate of necessity; but it likewise had actual pipe line laid and customers served by those pipe lines and knew that there were several gas wells available to them by lease or purchase which had been good [249] producing wells but had been cemented up. Then, would it be your opinion, in that change of the stated facts——

Mr. Walker: If the Court please, if we are trying to bring in the actual facts that the record shows, I think that we should also show that there was no gas being distributed at that time.

(Testimony of Roy M. Bauer.)

Mr. Maiden: There wasn't at the end of December 31, 1935. No gas was actually being distributed, but they had these wells that had simply been capped up. They were available to them.

Mr. Walker: The witness is an expert, if the Court please, and just capped up means something from being cemented in.

Mr. Maiden: All right, cemented in, and as of December 31, 1935 the corporation thought that they could bore out that concrete and attach up and have gas. Now, would that change your answer?

The Witness: Well, under those conditions, I would assume there was a possibility of gas production and the franchise would then have value.

Mr. Maiden: That is all.

Mr. Walker: Petitioner rests, your Honor.

The Court: For my information, let me ask this witness a question. I am not clear on it.

Will a certificate of convenience and necessity be issued [250] to any concern that has a source of supply of gas and prospective customers?

The Witness: Yes, generally speaking.

The Court: Well, what do you mean by "generally speaking"?

The Witness: Well, it would have to be economically feasible.

The Court: Well, I understand that. I said that had a source of supply of gas and had prospective customers.

(Testimony of Roy M. Bauer.)

The Witness: If it were not in competition with another concern, it would undoubtedly be granted the certificate.

The Court: Now, is it true that the certificate of necessity gives exclusive privileges in a given territory to distribute gasoline?

The Witness: Yes. That is the California Commission's procedure.

The Court: Under your California law that is an exclusive right and may be a monopoly?

The Witness: Yes, it is a regulated monopoly.

The Court: How may a certificate of convenience and necessity terminate? By non-use?

The Witness: By non-use and elimination of all possibility of future supply.

The Court: By "non-use", for how long? [251]

The Witness: That I am unable to say. Conditions change from time to time.

The Court: Then, as I understand from your testimony that if gas was not being distributed in conformity with the certificate of convenience and necessity issued in this case, that the right of the holder of that certificate of convenience and necessity would terminate?

The Witness: They would terminate after a considerable period of time.

The Court: Well now, I am not an expert and you are. What do you mean by, "a considerable period of time." I don't know your California law. You say that you are familiar with it.

(Testimony of Roy M. Bauer.)

The Witness: I also stated that I would have to know the exact conditions of a particular case, but let's assume that a company had a certificate and exercised it and then the supply disappeared. The company could continue to hold that certificate if no other company attempted to serve in that particular area and in the interim they had attempted to, by due diligence, to acquire an additional supply.

The Court: All right. Now, if another company that has a supply of gasoline and prospective customers attempts to serve in that community, that is what I am trying to get, at least.

The Witness: Then another public hearing is held and [252] the merits of the two are decided by the Public Utilities Commission.

The Court: And the certificate of convenience and necessity that had been issued prior thereto might be held a nullity and cancelled?

The Witness: That is correct, if this first company had no possibility of source of supply.

The Court: That is all I have.

(Witness excused.)

Mr. Maiden: Now, if the Court please, I have some exhibits to put in evidence. I would first like to offer in evidence, and Petitioner's counsel has agreed that he will have no objection—

The Court: All right, just make your offer.

Mr. Maiden: This is a certificate from the State of California, Office of the Secretary of State, cer-

tifying that these three corporations' charter was cancelled on January 3, 1940, and that they have not yet been revived.

The Court: Very well, it is offered in evidence.

Mr. Walker: No objection.

The Court: It will be received as Respondent's Exhibit M.

(The document above-referred to was received in evidence and marked Respondent's Exhibit M.)

RESPONDENT'S EXHIBIT M

[Letterhead]

State of California

Office of the

Secretary of State

Frank M. Jordan

Secretary of State

I, Frank M. Jordan, Secretary of State of the State of California, hereby certify:

That Central California Utilities Corporation, Gas Fuel Service Company and Kettleman Lakeview Oil and Gas Co., Ltd. became incorporated under the laws of this State by filing their Articles of Incorporation in this office on the dates respectively set forth: August 3, 1936, January 3, 1933, and April 6, 1931.

I further certify that the said "Central California

Utilities Corporation" was authorized to exercise all its corporate powers, rights and privileges at all times from and after August 3, 1936, to January 6, 1940;

That the said "Gas Fuel Service Company" was authorized to exercise its corporate powers, rights and privileges at all times from and after January 3, 1933, to March 6, 1935, whereupon it suffered a suspension of such powers, rights and privileges for nonpayment of franchise taxes due this State; that the said corporation became reinstated on May 17, 1935, and remained in good standing until January 6, 1940;

That the said "Kettleman Lakeview Oil and Gas Co., Ltd." was authorized to exercise its corporate powers, rights and privileges from and after April 6, 1931, to March 16, 1933, from and after July 6, 1933, to November 2, 1934, and from and after November 21, 1934, to January 6, 1940—there being a suspension of its corporate powers, rights and privileges for nonpayment of franchise taxes on March 16, 1933 (reinstatement on July 6, 1933), November 2, 1934 (reinstatement on November 21, 1934) and January 6, 1940.

I further certify that on the 6th day of January, 1940, pursuant to the provisions of Section 32 of the Bank and Corporation Franchise Tax Act of this State, a report was transmitted to my office by the Franchise Tax Commissioner wherein appeared the names of domestic and foreign corporations which

had failed to pay, prior to the time prescribed by said Section 32, the tax or any portion or installment thereof, or penalties and interest thereon, as computed and levied under said act.

I further certify that on said 6th day of January, 1940, a record was duly made in my office relative to the delinquency of each corporation affected by the said report, and that included in such recordation were the names "Central California Utilities Corporation," "Gas Fuel Service Company," and "Kettleman Lakeview Oil and Gas Co., Ltd."

I further certify that the suspension of the corporate powers, rights and privileges of each of the said corporations became effective upon such recordation on the 6th day of January, 1940, as provided by the aforesaid Section 32, and

That according to the records of my office the suspensions of the corporate powers, rights and privileges of each and all of the corporations herein referred to have not been lifted; that none of the said corporations has been reinstated since the 6th day of January, 1940, and

That the annexed transcript is a full, true and correct copy of the said January 6, 1940, suspension report except that copies of all pages not listing the names of the said corporations have been excluded.

In Witness Whereof, I hereunto set my hand and

affix the Great Seal of the State of California this
4th day of May, 1948.

/s/ FRANK M. JORDAN,

Secretary of State.

[The Great Seal of the State of California.]

By /s/ CHAS. J. HAGERTY,

Deputy.

[Letterhead]

State of California

Office of

Franchise Tax Commissioner

Sacramento

January 6, 1940.

Honorable Frank C. Jordan

Secretary of State

State Building

Sacramento, California

Dear Sir:

Pursuant to law, we are transmitting herewith a list of corporations whose corporate powers, rights, and privileges to do business in the State of California are to be suspended for failure to pay the taxes duly levied by the proper agency of the State of California.

We are also transmitting those foreign corporations doing business in the State of California who have failed to pay the taxes duly levied by the law to the State of California and their right to do business is also suspended.

The above transmission is in consonance with Chapter 13, Statutes of 1929, Section 32.

Yours very truly,

CHAS. J. McCOLGAN,

Franchise Tax Commissioner.

By /s/ J. P. HOLLINGS.

JPH:eg

Enclosure

[Filed in the office of Secretary of State, Calif., June 6, 1940.]

| | | |
|--------|---|------------|
| 174327 | Calor Holding Corporation..... | California |
| 159653 | Cal State Oil Corp..... | California |
| 177274 | Caltor Petroleum Corporation..... | California |
| 175185 | Cambria Mercury Company Ltd..... | California |
| 170251 | Campbell and Danielson Inc..... | California |
| 177488 | Campeet Oil Corp..... | California |
| 175219 | Camp Far West Mining Co..... | Nevada |
| 103955 | C & H Grocery Co..... | California |
| 176846 | Candid Cameras, Incorporated..... | California |
| 176609 | Canneries of California Inc..... | California |
| 136684 | Canton Lands Ltd..... | California |
| 175721 | Canyon-Falls Ranch-Klub Ltd..... | Nevada |
| 131316 | Capelis Safety Aeroplane Corporation Limited | California |
| 175006 | Capital Cigar and Liquor Company Inc.... | California |
| 166332 | The Carbofrezer Company of America..... | California |
| 174446 | Carbon Canyon Oil Corporation..... | California |
| 163037 | Cardinal Oil and Gas Company..... | California |
| 174851 | Cardinal Wines and Liquors, Store No. 1 Inc..... | California |
| 175211 | Cardinal Wines and Liquors, Store No. 2 Inc..... | California |
| 177267 | Career Builders of America..... | California |
| 106571 | Carly Realty Co. Ltd..... | California |
| 175591 | Carnall Trucks | California |

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|--------|---|------------|
| 143414 | Carnation Gold Mining Company Ltd..... | Nevada |
| 118138 | Carob Growers Products Company..... | California |
| 160444 | Caro-Lyn Petroleum Company | California |
| 139218 | Carr Oil Corporation..... | California |
| 174524 | Carter Wright Inc. | California |
| 176959 | Casa Manana | California |
| 114953 | Castle Building Co. A Corporation..... | California |
| 150005 | Cedar Investments, Inc. | Nevada |
| 177820 | Cedar Lodge Sanatorium..... | California |
| 83003 | Central Bank of Imperial Valley..... | California |
| 175607 | Central California Oil Co..... | California |
| 167972 | Central California Utilities Corporation... | California |
| 109650 | Central Hardware Company..... | California |
| 177698 | Central Milk Sales Agency..... | California |
| 172711 | Central Valley Oil Co..... | California |
| 172833 | Central Valley Oil Development Co..... | California |
| 161879 | Central Wholesale Co. | California |
| 113421 | Century Finance Corporation..... | California |
| 171945 | Century Furniture Inc..... | California |
| 177491 | Chain & Kahn..... | California |
| 176925 | Champion Molybdenum Corporation..... | California |
| 177186 | Chaney and Hill Inc..... | California |
| 158775 | Chapman-Meehan Casket Co. Inc..... | California |
| 151667 | Charcoal & Industrial Carbons Inc..... | California |
| 161305 | Charles Art Hairdresser Inc..... | California |
| 142049 | Cherokee Drift Mining Company..... | California |
| 171789 | Chidago Mines Inc..... | California |
| 167723 | Chief Pontiac Co. Inc..... | California |
| 172706 | The Children's Guild..... | California |
| 146805 | Chiquita Development Corporation..... | California |
| 64807 | C. H. Jenkins Company..... | California |
| 177048 | Christensen, Inc. | California |
| 176005 | Cigar Box Restaurant Inc..... | California |
| 174038 | Cineo Incorporated | California |
| 177778 | Cinema Clothes Ltd. | California |
| 174432 | Cine-Modes of Hollywood Inc..... | California |
| 174057 | Cino Realty Company..... | California |
| 177464 | Circle-K Ranch Inc..... | California |
| 151610 | Circus Markets Inc..... | California |
| 147753 | Citizens Insurance Agency Inc..... | California |
| 175489 | Citizens National Life Insurance Company | California |

| | | |
|--------|---|------------|
| 177513 | Citizens Prosperity Association, a non-profit corporation..... | California |
| 175488 | Citizens Sales Corporation..... | California |
| 132935 | √Foreign Auto Rentals Inc..... | California |
| 175910 | √Forest Lake Ranch, Inc. | California |
| 175182 | √Fortuna Mines, Inc. | Nevada |
| 94854 | √Fortuna Oil Company..... | California |
| 177732 | √49'ers, Inc. | California |
| 116868 | √Foss Heating and Engineering Company... | California |
| 163637 | √Foss Medicine Company, The..... | California |
| 119161 | √Foster Holding Company..... | California |
| 169702 | √Roster Motors, Inc..... | California |
| 47361 | √Foster-Quinn Company | California |
| 175174 | √4 HB Ranch, Inc..... | California |
| 170263 | √Foursquare Press, Ltd., The..... | California |
| 176882 | √Fourth and F. Corporation..... | California |
| 152624 | √Fox Blocks Company..... | California |
| 161459 | √Fox Specialty Company, a Corporation... | California |
| 167221 | √F. P. Grogan and Co..... | California |
| 102213 | √Fram Draying Co..... | California |
| 166597 | √Francisco Pontiac Company..... | California |
| 167614 | √Frankel-Kay-Diamond, Inc. | California |
| 175072 | √Frank Feliciano Beverage Company, Inc.. | California |
| 171701 | √Frank Groves Company..... | California |
| 107142 | √Frank L. Meline Incorporated..... | California |
| 175895 | √Frank M. Flynn & Co. Inc..... | California |
| 129971 | √Frank T. Hickey Company..... | California |
| 168169 | √Fred B. Thompson Corporation..... | California |
| 174068 | √Frederick Palmer Academy of Creative Writing, Inc. | California |
| 145943 | √Fred H. Lundblade Co..... | California |
| 176546 | √Fredna, Inc. | California |
| 128894 | √Fredroy Realty Company..... | California |
| 174852 | √Fred Siemon, Inc. | California |
| 125077 | √Freeman Holding Corporation..... | California |
| 158100 | √French American Wine Co..... | California |
| 73530 | √French Bakeries Company..... | California |
| 168151 | √Friant Products Co..... | California |
| 177613 | √Fridman's, Inc. | California |
| 175848 | √Frigid-O-Matic Corporation, The..... | California |
| 174700 | √Front Page Copy Holder Co..... | California |
| 175350 | √Frosti-Server Corporation | California |

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|--------|--|------------|
| 164827 | √Fuerst Gold and Refining Co. Inc..... | California |
| 49435 | √Fullerton Oil Company..... | Arizona |
| 169929 | √Ful-Ton Truck Company..... | California |
| 177083 | √Fur Research Bureau of North America... | California |
| 177892 | √Ga-Ga Inn | California |
| 147875 | √G. & G. Air Lines Company, Ltd..... | Arizona |
| 170993 | √G & M Manufacturing Company..... | California |
| 161562 | √Gangplank Corporation, The..... | California |
| 174111 | √Ganz Corporation..... | California |
| 127822 | √Garden City Meat Co..... | California |
| 167950 | √Gardner Realty & Investment Company... | California |
| 176060 | √Garner Bros. Oil Co..... | California |
| 175679 | √Garry Oil Company | California |
| 177402 | √Garutso Lens, Inc..... | California |
| 174008 | √Gasav Incorporated | California |
| 152202 | √Gas Fuel Service Company..... | California |
| 172674 | √Gasoil Production, Co. | California |
| 173959 | √Gel-Sten Duplicator Company..... | California |
| 162480 | √G. E. Mathews Co., Inc..... | California |
| 167318 | √General Appliances, Inc..... | California |
| 132631 | Kalif Corporation | Delaware |
| 165596 | K & G Sports Togs Company..... | California |
| 177854 | Kanin Building Company, Inc..... | California |
| 175162 | Karl's Place, Inc..... | California |
| 176376 | Karp-Stuecker Incorporated | California |
| 99903 | Kellas Estate Company..... | California |
| 174249 | Kelly's 5 & 10, Inc..... | California |
| 169272 | Kelly-Smith Company | California |
| 121500 | Kelsey Mining Co., Inc..... | California |
| 176223 | Kenber Oil Company | California |
| 154540 | Kened Co. | California |
| 176525 | Kennett Construction, Club..... | California |
| 177323 | Kent Lines, Inc., The..... | California |
| 176660 | Kerben Oil Company..... | California |
| 174875 | Kern County Citizens' Association..... | California |
| 39461 | Kern Delta Realty Co..... | California |
| 166691 | Kern Leasing Company..... | California |
| 171563 | Kern Service, Inc..... | California |
| 117466 | Kesterson Lumber Company..... | California |
| 144157 | Kettleman Lakeview Oil and Gas Co. Ltd.. | California |
| 174953 | Key Oil Company..... | California |

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|--------|--|------------|
| 150981 | Kilkea Investment Corporation..... | California |
| 177120 | Kimberly Oil Corporation..... | California |
| 164957 | King-McCray Oil Company..... | California |
| 89367 | Kiyomura Farm Company..... | California |
| 160272 | Klamath Pine Lumber Company..... | Oregon |
| 176088 | K. L. C. Milling Co..... | California |
| 66968 | Klein Simpson Fruit Company..... | California |
| 167577 | Klingtite Products Company..... | California |
| 174718 | K M T Investment Corporation..... | California |
| 166087 | Knit and Sportwear Shop..... | California |
| 98910 | Knowles Corporation, The..... | California |
| 157787 | Knox Bros. | California |
| 112243 | Koch Builders Inc..... | California |
| 110672 | Koff Holding Co..... | California |
| 141525 | K. O. Laboratories Ltd..... | California |
| 150498 | Koshaba & Co., of Oakland..... | California |
| 140110 | K. P. Lowell & Company Ltd..... | California |
| 172305 | Kraco Mfg. Corp., The..... | California |
| 170617 | Kroesen Mfg. Co..... | California |
| 173997 | La Conga, Inc. | California |
| 176133 | Lady Lee Cosmetic Co..... | California |
| 150845 | Lafayette Petroleum Corporation..... | California |
| 174657 | Laff & Zeidler, Inc..... | California |
| 167419 | Laird, Inc. | California |
| 176273 | Lake Canyon Mutual Water Company..... | California |
| 173998 | Lake Chemical Company..... | California |
| 177838 | Lake County Water Company..... | California |
| 176305 | Lake Mead Hotel and Resort Corporation.. | California |
| 174064 | Lake View Development Company..... | California |
| 174681 | La Mirada Pottery..... | California |
| 104069 | La Mode Shoes Inc..... | California |
| 173915 | Landes Packing Company, Inc..... | California |
| 168901 | L & L Mining Company Inc..... | California |
| 175867 | Langlois Oil Re-Refiner Sales Co..... | California |
| 174497 | Lang-Schwartz, Inc. | California |
| 146808 | Lantz Corporation Ltd. | California |
| 175430 | La Posea Distributing Co..... | California |
| 65108 | La Roca Monte Rancho..... | California |

Admitted May 6, 1948. T. C. U. S.

Mr. Maiden: Now, if the Court please, I would like [253] to offer in evidence the original income tax returns of the Kettleman-Lakeview Oil and Gas Company, Ltd., for 1936, 1938, 1939 and 1940. Unfortunately I wasn't able to get the 1937 return. I offer those documents as Respondent's exhibits next in order.

The Court: Any objection?

Mr. Walker: No objection.

The Court: They will be received in evidence as Respondent's Exhibits N, O, P, and Q.

(The documents above-referred to were received in evidence and marked Respondent's Exhibits N, O, P and Q.)

Mr. Maiden: Next, if the Court please, I should like to offer the original income tax—Corporation Income And Excess-Profits Tax returns of the Central California Utilities Corporation, which is the debtor in this case, for the calendar years 1936 through 1940, inclusive, as Respondent's next exhibits in order.

The Court: How many are there?

Mr. Maiden: There are five, your Honor.

The Court: They will be received in evidence as Respondent's Exhibits R, S, T, U and V.

(The documents above-referred to were received in evidence and marked Respondent's Exhibits R, S, T, U and V.)

Mr. Maiden: Next, if the Court please, I should like to offer in evidence as Respondent's exhibits

next in order the [254] Corporation Income And Excess-Profits Tax Returns of Capital Service, Inc., for the years 1936 through the taxable year 1943, both inclusive, and that would be eight separate documents.

The Court: They will be received in evidence as Respondent's Exhibits W, X, Y, Z, AA, BB, CC and DD.

(The documents above-referred to were received in evidence and marked Respondent's Exhibits W, X, Y, Z, AA, BB, CC and DD.)

Mr. Maiden: Now, if it please the Court, Respondent has not been able to obtain in time enough to offer here and now in evidence the Corporation Income and Excess-Profits Tax Returns of the other subsidiary, that is, Gas Fuel Service Company. They have been moving in Washington, your Honor, from one warehouse to another, and with the agreement of counsel for Petitioner, which I believe has already been given, I should like the opportunity to have the Court grant either of the parties the right to introduce those returns in evidence in Washington by stipulation to be filed with the Court.

Mr. Walker: It is agreeable to the Petitioner, your Honor.

Mr. Maiden: It simply completes the picture.

The Court: By agreement of counsel, the income tax returns of the Gas Fuel Service Company from 1936 to 1940, both inclusive, may be received in evidence, and it is understood that those returns

may be supplied for the files later. Is that agreeable? [255]

Mr. Walker: That is correct, your Honor.

Mr. Maiden: Yes.

The Court: And that those returns shall be marked Exhibits EE, FF, GG, HH and II.

(The documents above-referred to were marked Respondent's Exhibits EE, FF, GG, HH and II by reference and were reserved.)

The Court: Is that right, gentlemen?

Mr. Walker: I believe I lost track somewhere, your Honor. On the Capital Service returns, I believe we have them from 1936 through 1943. Is that right, counsel?

Mr. Maiden: We had for Capital Service from 1936 through 1943.

Mr. Walker: That is eight instead of seven, your Honor.

Mr. Maiden: That is my fault. I told your Honor there were seven documents there and there is really eight, so we do have our exhibits bawled up as they now stand.

The Court: Well, I have them in order as you gave them to me so they will come out right.

Are you gentlemen willing to have the record show what the sequence is?

Mr. Maiden: Yes.

Mr. Walker: Let the record show the correct sequence.

The Court: Is that all the returns you expect to offer?

Mr. Maiden: Yes, sir. [256]

The Court: How about leave to withdraw to substitute?

Mr. Maiden: Yes, sir, I was just fixing to come to that. I would like to have permission to substitute photostats of these returns in lieu of the originals and the returns that are to be supplied in Washington.

I would like to have the permission, which, of course, will be with counsel for the Petitioner to simply send to the Court certified copies of those rather than send the original and then have to withdraw them, because I will have the photostats made here and Mr. Walker can compare the originals and the photostats.

The Court: Leave given Respondent to substitute photostatic copies of the various income tax returns referred to. I think that takes them all in.

Mr. Maiden: Now, if the Court please, there is one other thing. I put in an exhibit here which is a certificate from the Secretary of State, and I haven't given counsel for the petitioner a copy. I would like to withdraw that exhibit now and have a copy made of it and turned over to counsel for Petitioner, and then I will return the original before the Court leaves.

The Court: Is that agreeable?

Mr. Walker: It is agreeable to the Petitioner.

The Court: Leave given Respondent to withdraw the [257] exhibit referred to for the purpose of making a copy thereof for counsel for Petitioner.

Mr. Walker: I believe it is Exhibit M.

The Court: Is that Exhibit M?

Mr. Maiden: Yes, sir, Exhibit M.

The Court: Very well, gentlemen. Anything further?

Mr. Maiden: That is all for the Respondent.

The Court: Anything further for Petitioner?

Mr. Walker: Petitioner rests, your Honor.

The Court: How about your briefs, gentlemen?

Mr. Walker: It is the pleasure of the Court as far as the Petitioner is concerned.

The Court: Do you want concurrent briefs or consecutive briefs?

Mr. Maiden: It is immaterial with me, if the Court please.

The Court: Concurrent briefs to be filed on or before 45 days—is that sufficient?

Mr. Walker: 45 days is ample for Petitioner.

The Court: 45 days is June the 21st. Concurrent briefs to be filed on or before June 21st, 1948. Reply briefs are to be filed on or before—do you want 30 days for that?

Mr. Maiden: 30 days.

Mr. Walker: 30 days.

The Court: July the 21st. Is that satisfactory, gentlemen? [258]

Mr. Maiden: That is satisfactory.

Mr. Walker: That is agreeable.

The Court: Very well, gentlemen. Thank you.

(Whereupon, at 2:20 o'clock p.m., an adjournment was taken until 3:05 o'clock p.m., Tuesday, May 11, 1948.) [259]

The Court: You may proceed.

Mr. Maiden: Judge Arnold, I would like to indulge just one second of your time, if I may, in the Capital Service, Inc., and state to you that due to technical difficulties in getting copies of photostats of various of the exhibits before the Court leaves here, we would like to ask that the Court employ the somewhat unusual practice of allowing the Respondent to withdraw and hold all of the exhibits in the Capital Service, Inc., case for the purpose of preparing our briefs, and Respondent will assume full responsibility and will return the exhibits to the Court after the briefs have been filed.

The Court: Have you consulted with counsel for the Petitioner?

Mr. Maiden: Yes, sir, and he has authorized to make this statement to the Court.

The Court: It is satisfactory with him?

Mr. Maiden: It is entirely satisfactory.

The Court: It is satisfactory with the Court then.

Mr. Maiden: Thank you, your Honor.

The Court: If it is done by agreement, then the record may show that it is done by agreement.

Mr. Maiden: Yes. Thank you, your Honor.

(Whereupon at 3:10 o'clock p.m., Tuesday, May 11, 1948, the hearing in the above-entitled matter was closed.) [262]

[Title of Tax Court and Cause.]

MOTION FOR EXTENSION OF TIME FOR
FILING OPENING AND REPLY BRIEFS

Comes Now the respondent, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and moves that the Court extend the time for filing the opening briefs of the respective parties in the above entitled proceeding, from June 21, 1948, to July 31, 1948, and thirty days thereafter for the filing of reply briefs, to-wit:
August 30, 1948.

The grounds for this motion are:

(1) Just prior to the conclusion of the hearing in the above entitled proceeding, the court granted permission to respondent, it being agreeable to counsel for petitioner, to put in evidence by stipulation to be filed with the Court at Washington, D. C., the income and excess profits tax returns of the Gas Fuel Service Company for the years 1936 through 1940. This corporation is one of the subsidiary corporations whose activities and operations bear directly upon the question of the stock and bad debt losses claimed by petitioner and disallowed by respondent in the statutory notice. These returns, to be later filed in evidence, as aforesaid, were ordered marked as though in evidence as respondent's Exhibits EE to II, inclusive (Tr. 256). Said returns,

though requisitioned from Washington, have not as yet arrived and it is extremely doubtful, in view of the difficulty in locating old returns, that they will be available to the parties, for such use as may be required in their opening briefs, before the middle of July 1948.

(2) With regard to the extension, prayed for herein, to July 31, 1948, instead of some earlier date in July, respondent would show to the Court that trial counsel's brief for respondent is required to be in Washington for review at least two weeks prior to the time for filing with the Court.

(3) A new calendar of the Tax Court will be held in Los Angeles commencing June 21st and trial counsel for respondent in this case has several cases to prepare for trial on that calendar and will thus be compelled to stay his preparation of the brief in this case until approximately July 5th, even if the requested returns should be received here before the present due date of the opening briefs, to wit: June 21, 1948. Therefore, respondent's counsel, in addition to the failure to receive the aforesaid returns, which are required for use in his opening brief, needs the full time herein requested in order to consider and adequately prepare his brief in the case after the receipt of said returns, and have it

transmitted to Washington for review at least two weeks prior to filing with the Court.

Wherefore, it is prayed that this motion be granted.

/s/ CHARLES OLIPHANT,

EAT

Chief Counsel,

Bureau of Internal

Revenue.

Of Counsel:

B. H. NEBLETT,

Division Counsel.

E. C. CROUTER,

R. E. MAIDEN, JR.,

Special Attorneys,

Bureau of Internal Revenue.

No Objection:

CHARLES M. WALKER,

Counsel for Petitioner.

/s/ WILLIAM W. ARNOLD,

Judge.

Received and filed June 14, 1948 T.C.U.S.

Granted June 15, 1948 T.C.U.S.

Served June 16, 1948.

[Title of Tax Court and Cause.]

MOTION TO CORRECT TRANSCRIPT

Comes now petitioner, by its counsel of record, and moves that the transcript of record in this proceeding be corrected as follows:

Page 5 Line 1, which reads "1947 of an indebtedness owed by petitioner to a corporation" should read "1942 of an indebtedness owed to petitioner by a corporation."

Page 39 In line 16, date "1935" should be "1936."

Page 105 In line 6, date "1942" should be "1940."

Page 114 In line 1, date "1939" should be "1936."

Page 170 In line 14, the word "not" should be inserted after "It was."

Page 179 In line 11, word "Moore's" should be "Woodard's."

Page 198 In line 21, word "business" should be "public."

Page 205 In lines 9 and 10, the phrase "from Capital Service by G. Brashears" should be "by Capital Service from G. Brashears."

Page 208 In line 3, number "27" should be "37."

Page 223 In line 5, word "it" should be "you."

Page 223 In line 6, word "no" should be "to know."

Page 223 In line 15, word "with" should be "without."

Page 224 In line 8, word "no" should be "yes."

Page 230 In line 14, word "depression" should be "repressuring."

Page 256 In line 15, after the word "Honor" a new paragraph should be started as a statement by Mr. Maiden.

Wherefore, it is prayed that this motion be granted.

/s/ CHARLES M. WALKER,
Counsel for Petitioner.

July 27, 1948.

No Objection:

/s/ CHARLES OLIPHANT,
ECC
Counsel for Respondent.

/s/ WILLIAM W. ARNOLD,
Judge.

Received and filed Aug. 2, 1948 T.C.U.S.

Granted Aug. 2, 1948 T.C.U.S.

Served Aug. 4, 1948.

[Title of Tax Court and Cause.]

MEMORANDUM OF FINDINGS OF FACTS
AND OPINION

1. In 1936 and 1937 petitioner invested in stock of, and made loans to, Central California Utilities Corporation. On its consolidated return for 1942

petitioner claimed the stock investment and the indebtedness as deductions upon the ground of worthlessness, resulting in a net operating loss for 1942 and a net operating loss carry-over to 1943. Respondent determined that the debt and the stock investment became worthless prior to 1942 and denied the claimed 1942 net operating loss carry-over as a deduction for 1943. Held, the stock investment and the indebtedness became worthless prior to January 1, 1942, and petitioner is not entitled to deduct in 1943 a net operating loss carry-over from 1942.

2. In 1941 petitioner filed a separate return which showed a net operating loss. In 1943 petitioner and its subsidiary filed a consolidated return. None of the income reported on the 1943 consolidated return represented income of the petitioner. Held, petitioner is not entitled to carry over its 1941 net operating loss (a separate return year) and deduct it from 1943 consolidated income, a year in which it had no income.

Charles M. Walker, Esq., and James L. Wood, Esq., for the petitioner.

R. E. Maiden, Jr., Esq., for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

Arnold, Judge:

This case involves an income tax deficiency for the calendar year 1943 in the sum of \$7,358.10. The principal issue is whether petitioner is entitled to a net operating loss deduction in 1943, representing

a net operating loss carry-over from the calendar year 1942. In computing its net operating loss for 1942 petitioner deducted \$31,567.81 as an alleged bad debt of, and \$1,300 as an alleged loss on capital stock of, Central California Utilities Corporation. Respondent disallowed both deductions for 1942 and determined that petitioner had net income instead of a net operating loss carry-over for the latter year.

The other issue involved herein is whether petitioner can carry over a 1941 net operating loss of \$2,752.49, a year for which it filed a separate return, and deduct the loss in 1943, a year for which it filed a consolidated return.

From the oral testimony, the documentary evidence, and the partially stipulated facts we make the following

FINDINGS OF FACT

Petitioner is a California corporation, formed April 23, 1936. For the calendar years 1942 and 1943 it filed consolidated returns with the collector for the sixth district of California. Petitioner's subsidiary, A. & W. Baking Company (name changed to Danish Maid Bakery), joined in filing the consolidated returns.

For 1940 and 1941 petitioner and its subsidiary each filed an income tax return. In 1940 the subsidiary sustained a net operating loss of \$17,846.84; petitioner sustained a net operating loss of \$7,082.40 for the same year. In 1941 the subsidiary sustained a net operating loss of \$8,681.99; for the same year

petitioner sustained a net operating loss of \$2,752.49.

In the 1942 consolidated return the subsidiary had a net income of \$5,685.22, exclusive of a net operating loss deduction; petitioner reported a net operating loss of \$27,492.98 for 1942. In arriving at said loss petitioner deducted, upon the grounds of worthlessness: (1) an indebtedness of \$31,567.81 owed to it by Central California Utilities Corporation; and (2) \$1,300 representing the adjusted basis to it of 1,050 shares of stock of Central California Utilities Corporation. In the notice of deficiency herein respondent disallowed said deductions, totaling \$32,867.81, and determined that, with \$4,103.53 of deductions not claimed by petitioner but allowed by respondent, petitioner had an adjusted net income for 1942 of \$1,271.30, excluding net operating loss deductions.

None of the income reported on the 1943 consolidated return of petitioner and its subsidiary, in the amount of \$122,566.32, represented income of the petitioner. Adjustments by respondent for 1943 resulted in his determination that the consolidated net income adjusted for 1943 was \$25,196.55 instead of the net loss of \$23,012.20 reported on the consolidated return.

Central California Utilities Corporation, hereinafter referred to as Central, is a California Corporation, formed August 3, 1936, for the purpose of taking over the assets and liabilities of the Inland Public Service Company, hereinafter referred to as Inland. Continuously after some time in 1933,

and prior to the formation of Central in 1936, Inland owned all the issued and outstanding stock of Gas Fuel Service Company and Kettleman Lakeview Oil and Gas Co., Ltd., hereinafter referred to as Fuel and Kettleman, respectively. The primary function of Kettleman was to own producing wells and leases upon which such wells could be drilled, and to produce gas for sale. The primary purpose of Fuel was to buy gas from Kettleman and others and distribute it for sale to customers in Kings and Fresno Counties, California.

All of the issued and outstanding shares of Fuel and Kettleman were acquired by Central from Inland on or about September 5, 1936. At all times material hereto such shares were the sole assets owned by Central. The certificate of dissolution of Inland was filed with the California Secretary of State on March 10, 1937.

The early history of Fuel and Kettleman is partially revealed by Decision 26178 of the Railroad Commission of California, 38 C.R.C. 875. It appears therein that on January 23, 1933, Fuel asked the Commission for an order certifying that "public convenience and necessity require and will require the construction and operation of a natural gas transmission and distribution system for the service of natural gas to the agricultural power users in Fresno and Kings Counties and to exercise franchise rights which it contemplates acquiring from said counties." Three other companies resisted Fuel's application and a series of public hearings

were held by the Commission. The Commission's decision shows that in or about 1930 the organizers of Fuel owned approximately 1,500 acres of potential oil and gas lands in the Dudley Ridge area of Kings County; that these owners organized Kettleman for the development of their properties; that at the time of the *the* hearings (April and May 1933) three producing gas wells were on the properties, which witnesses estimated had a daily production of 20,000,000 cubic feet over a period of 20 years; that Fuel sold under contract to Pacific Gas and Electric Company 1,000,000 cubic feet of gas per day and small quantities of gas to others in the vicinity of the wells; that a survey of farmers of Kings and Fresno Counties, made to secure new outlets for its surplus gas production, indicated approximately 81 potential gas users who would secure an over-all saving of one-third to one-half of their present costs; that Fuel proposed to sell gas at 16 cents per 1,000 cubic feet in Kings County and at 17 cents per 1,000 cubic feet in Fresno County; that such rates were much lower than the rates of the opposing companies; that Fuel would be farmer owned, controlled and managed; and that the estimated cost of installing its proposed transmission and distribution lines was approximately \$680,861. The Commission granted Fuel's request and denied the requests of the resisting companies on July 21, 1933.

During May 1933, Kings and Fresno Counties each granted Fuel a franchise by ordinances, which

ordinances have never been repealed. Each franchise gave Fuel the non-exclusive right and privilege of using the County's streets, highways and alleys for the purpose of laying and maintaining a gas distribution line. Each franchise required work to commence thereunder within four months or the franchise "shall be declared forfeit." Each franchise required Fuel, or its assigns, to pay the County after the fifth year, two per cent of the gross annual receipts arising from the use of the franchise.

Under date of August 28, 1933 the Railroad Commission of the State of California granted Fuel a certificate of public convenience and necessity

* * * authorizing said utility to exercise the rights and privileges granted to it under Ordinance No. 151 of the County of Kings and Ordinance 290 of the County of Fresno, provided that the Commission may hereafter, by appropriate proceedings and orders, revoke or limit, as to territory not then served by Gas Fuel Service Company, or its successors in interest, the authority herein granted.

Following receipt of its certificate Fuel laid approximately 32 miles of gas line in Kings County. Thereafter it distributed gas procured from Kettleman to its customers. Early in 1935 Kettleman's only gas well blew out depriving Fuel of its gas supply. At the time Fuel lost its gas supply it was serving 10 or 12 customers.

By December 31, 1935 Inland was in financial difficulties. The combined book assets of Inland, Fuel and Kettleman as of that date showed current assets of \$1,800 and current liabilities in excess of \$60,000. Other assets of the companies were valued on their books at December 31, 1935 as follows: pipe lines, \$44,740.78; meters and regulators, \$354.56; general office equipment, \$463.98; miscellaneous equipment, \$407.55; lands and leases, \$901,112.50; and wells, \$200,000. Subsequently, and as of December 31, 1935, the book values of lands, leases and wells were eliminated by quit-claims and abandonment.

Late in 1935 or early in 1936 one of the promoters of Inland approached Ralph W. Moore seeking financial aid. Moore investigated Inland's condition and its prospects. His investigations convinced him that if Inland was reorganized and financed, it could become a very profitable operation. He found that Fresno and Kings Counties offered a practically unlimited market and that ample gas supplies appeared to be available within the area served by Fuel or in nearby areas. He located three gas wells that could be purchased or leased, which, on the basis of prior production, would provide an ample supply of gas. Two of the wells had been plugged with cement and one had been capped. Oil companies operating in or near Kings and Fresno Counties had had to shut down their gas wells because the Pacific Gas and Electric Company had ceased purchasing gas in the area, and Moore considered

the shut down wells as a further source of supply. He became quite optimistic over Fuel's prospects and succeeded in getting G. Brashears and Company, a Los Angeles firm engaged in selling securities, to put up \$20,000 to enable Inland to resume operations. G. Brashears and Company will hereinafter be referred to as Brashears.

Moore and Brashears agreed that, after Inland's business was restored to an operating basis, a new company (Central) would be organized to acquire Inland's assets and liabilities. The plan of reorganization contemplated that petitioner would advance the money needed for the Inland project. Such sums as Moore and Brashears advanced temporarily were repaid by the petitioner. Under the plan of reorganization Moore and Brashears were to have a 25 per cent interest and a 75 per cent interest, respectively, in the promotion stock, Inland stockholders were to receive stock of the new company (Central) and the remaining shares of the authorized issue were to be held for possible future sale to the public. The promotional stock represented over 50 per cent of the shares entitled to vote. Such stock had no cost basis in petitioner's hands. Since some time in 1936 petitioner has owned 1,050 shares of Central's capital stock, which has an adjusted cost basis of \$1,300.

After Central was organized and during 1936 petitioner made cash advances to or for its benefit totaling \$25,561.71, which included sums advanced by Moore and Brashears. Credits to this account dur-

ing 1936 totaled \$5,311.71, leaving a balance due petitioner on January 1, 1937 of \$20,250. During 1937 additional cash advances were made to Central by petitioner in the aggregate amount of \$14,000. Except for a \$50 advance on January 24, 1938, no further loans were made by petitioner to Central. The amount of Central's indebtedness to petitioner at January 31, 1938 was \$34,300. Credits to the account of \$1,900 on June 3, 1938 and \$832.19 on April 30, 1940 reduced the indebtedness to \$31,567.81, as of April 30, 1940, which was the amount finally charged off petitioner's books as a loss on December 31, 1942.

The funds advanced by petitioner to Central enabled its subsidiary, Fuel, to resume operation of its gas distributing system. A portion of the funds were used by Kettleman in an unsuccessful attempt to bring in its own gas wells, after which it obtained a supply of gas from a nearby capped gas well. This supply was ample for the limited number of customers then being served by Fuel. On or about May 29, 1937 this well was destroyed by geophysical tests conducted by Shell Oil Company in nearby territory. On or about July 21, 1937 Fuel contracted for a supply of gas from Southern California Gas Company. Fuel's contract with Southern was terminated on or about November 11, 1937, because Fuel failed to pay for the gas. At that time Fuel's gas bills exceeded \$1,100 and its bills were unpaid since the middle of August. At no time thereafter did Fuel operate its gas distribution

system. At the time Fuel ceased operating its gas system it had about 10 customers.

In November 1937 Fuel applied to the Railroad Commission of California for permission to temporarily discontinue its service in Kings County. Permission was granted by the Commission on January 3, 1938. In its opinion the Commission pointed out that the tremendous line losses sustained by Fuel¹ "is entirely inexcusable and indicates gross inefficiency on the part of the applicant in the maintenance of its facilities." Fuel was ordered to complete repairs to its lines and facilities as soon as possible and to file progress reports with the Commission at the end of each 30 days. Fuel estimated that the repairs could be made in from 60 to 120 days at a cost of \$2,000.

Fuel notified Shell Oil Company, by letter dated June 2, 1937, of the destruction of its gas supply by the acts of the latter's employees and demanded satisfaction from Shell. The extent and the nature of the negotiations with Shell are undisclosed but petitioner's account with Central shows a credit of \$1,900 on the latter's indebtedness under date of June 3, 1938 which represented an amount received in settlement of Fuel's controversy with Shell.

No attempt was made by Fuel to repair its gas distribution system. Floods in 1938 further dam-

¹Fuel showed the Commission that it purchased 2,614,000 cubic feet of gas from Southern California Gas Company during October, 1937, while sales to its customers totaled 422,341 cubic feet, the difference being attributed to line losses.

aged the lines with the result that in 1939 Fuel sold the pipe and all of its other physical assets. It sold its pipe lines for about \$2,500, the purchaser agreeing to pay Fuel's taxes and turn over the receipted tax bill with his check for the difference. Central's account with petitioner shows that the difference amounted to \$832.19, which was credited on petitioner's books, April 30, 1940. Fuel turned over its regulators, meters and a Chevrolet truck to one of its employees in satisfaction of unpaid wages. After disposing of these assets Fuel's sole remaining asset was its certificate of public convenience and necessity.

By December 1, 1939, Kettleman was without property of any kind whatsoever and never thereafter acquired, owned or held any property.

On or about January 6, 1940, the corporate charters of Central, Fuel and Kettleman were suspended by the Secretary of State of California for failure to pay the State franchise tax. At all times thereafter these charters were suspended.

Negotiations looking forward to securing a supply of gas for Fuel were conducted by Moore with various individuals and oil companies during 1937 and thereafter. Moore's early negotiations were based upon the purchaser supplying the gas only; his later negotiations were based upon the purchaser supplying the gas and a new pipe line system for distribution. By December 31, 1940 all of these negotiations had proved fruitless. On March 25, 1941, and in August, 1941 he wrote letters to two separate

individuals seeking unsuccessfully to interest them, their associates, or their clients in the project.

During the interim between January 3, 1938, (when Fuel was permitted temporarily to suspend its service) and October 6, 1942, the Railroad Commission repeatedly called upon Fuel to advise it when Fuel would resume service. Fuel or Central gave the Commission various reasons for its failure to resume service to its customers. On October 8, 1938, the Commission was advised that the flooded condition of the land indicated that it would be well into the year 1939 before flood waters receded to a point where customers would require resumption of service for water pumping. In August, 1939, and in June, 1940, the Commission was advised that there was still no demand for gas for water-pumping purposes. On March 17, 1941, the Commission advised Central that if it intended to abandon service in its territory a formal application to the Commission should be made. On March 25, 1941, Central replied that negotiations were under way looking forward to possible resumption of service, but that if the negotiations were not successfully concluded the abandonment of the "franchise" held by Fuel would be taken up with the Commission. From October 15, 1941, to May 22, 1942, inclusive, the Railroad Commission wrote Central at least five letters requesting information about the status of Fuel and when service to its customers would be resumed. On June 9, 1942, the Commission was advised that Fuel "is no longer operating, having

been inactive for the past three years." By order dated October 6, 1942, the Railroad Commission revoked Fuel's certificate and referred in its opinion to Fuel's letter of June 9, 1942 as one of the reasons for the revocation.

In a letter to Moore on November 22, 1940, the Internal Revenue Agent in charge in Los Angeles stated that certain stockholders of Central had claimed that their stock became worthless in 1939. Moore was requested to "furnish information covering any event which in your opinion rendered the stock worthless. It is noted that the balance sheet of December 31, 1939 shows stock in subsidiaries, \$1,124,507.49." In his reply, dated December 2, 1940, Moore stated that the stock value of \$1,124,507.49 represented the book value of Fuel and Kettleman, wholly owned subsidiaries; that Central had no assets other than the stock of its subsidiaries; that the subsidiaries had no assets of any nature except the "questionable value of its certificate of public necessity"; that the value thereof was commensurate with whatever profit Fuel "might be able to earn from its operations, all of which now are suspended," and that it was his personal opinion as principal officer of the three corporations "that their stock became practically worthless in the early part of 1939."

The income tax returns of Kettleman, Fuel, Central and petitioner for the taxable years of 1936 to

1939, inclusive, show losses for each taxable year by each corporation.² The income tax returns for 1940 of Kettleman, Fuel and Central each contain the following statement: "Corporation dormant for past two years. No transactions of any nature in 1940. Corporate franchise cancelled for non-payment of state franchise in 1938." Petitioner's income tax returns for 1940 to 1943, inclusive, show losses as follows:

| | |
|-------------|-------------|
| 1940 | \$ 7,082.40 |
| 1941 | 30.50 |
| 1942* | 49,198.79 |
| 1943* | 23,012.20 |

*Consolidated return filed with A. & W. Baking Company.

During 1937 petitioner invested in two other business enterprises in addition to Central. These investments were in Timm Aircraft Company and Ful-Ton Truck Company. Petitioner disposed of its investment in Timm Aircraft in 1942 at a profit of \$5,650. Its investment in Ful-Ton Truck Company evolved eventually into its wholly owned subsidiary, the A. & W. Bakery Company, a wholesale bakery. Petitioner continued to finance the Aircraft Company and the Bakery Company after it ceased financing Central.

²No tax return for Kettleman for 1937 was placed in evidence.

The indebtedness of Central to petitioner and the stock owned by petitioner in Central became worthless prior to January 1, 1942.

Opinion

The principal question is whether petitioner sustained a net operating loss in 1942. There is no dispute about the deductibility of such a loss in 1943 if in fact a loss was sustained subsequent to January 1, 1942. Whether petitioner had a net operating loss in 1942 depends upon whether an indebtedness of Central became worthless in that year and also whether certain shares of stock of Central became worthless in 1942. Respondent determined that the indebtedness and the stock became worthless prior to 1942.

Petitioner contends that the preliminary financing of Central was one of the purposes for which it was organized; that at the time the loans were made such loans had a potential value but no real, liquidating, actual or intrinsic value because the debtor had insufficient assets from which to obtain repayment; that petitioner knew this, but nevertheless made the loan, purely as a business proposition, expecting repayment (and a profit on a large block of Central's promotional stock) only from the revived and expanded activities of the debtor which were to be touched off by the expenditure of the money advanced; that while the loan did not actually touch off the revived and expanded activities as planned, the activities continued to be very much

in prospect until war conditions developed in 1942; and, therefore, that at all times to 1942 there was a substantial potential value existing in Central's indebtedness and stock.

We can not agree with petitioner. The facts show that long prior to 1942 the promoters of Central had given up all real hope of continuing this venture. Their efforts to secure a supply of gas from their own wells failed in or prior to 1937. Their remaining source of supply was destroyed in May, 1937 by the geophysical tests conducted by Shell. Their purchasing agreement with Southern California Gas Company was terminated November 11, 1937 because of failure to pay for the gas purchased since the middle of August, 1937. After November 11, 1937, Central never had a supply of gas for its customers. On January 3, 1938, the Railroad Commission permitted temporary suspension of service to customers upon the representation that repairs to the distribution system could be completed in 60 to 120 days at a cost of \$2,000. The repairs were never made. It is reasonable to assume that any intention to make the repairs that might have existed when the representations were made to the Railroad Commission was wiped out with the floods in Fuel's territory in 1938. Instead of making repairs to its distribution system, Fuel disposed of its pipe line and other physical assets. By the end of 1939 Fuel had no assets except its certificate of public convenience and necessity, and Kettleman had no assets whatever. On January 6, 1940 the

corporate charters of Fuel, Kettleman and Central were suspended and never thereafter revived.

At January 31, 1940, petitioner had an investment in Central of \$32,400 in loans and \$1,300 in stock. Central held as its sole assets the capital stock of Fuel and Kettleman. The latter corporations had as their sole asset the certificate owned by Fuel. The charters of all three corporations were suspended and losses had been sustained each year of operation. Before gas service could be resumed a new distribution system had to be purchased and installed and a supply of gas obtained. A new distribution system would have required an outlay of funds greatly in excess of the estimated cost of repairs or the accumulated gas bills on Fuel's purchasing agreement, both of which petitioner refused to finance. The testimony indicates that petitioner preferred to finance its other enterprises because the opportunities for profit were much better.

Thus it appears that at least by April 30, 1940, petitioner had made its election and that the Central project was abandoned insofar as any additional investment of funds was concerned. It is clear too that by the end of 1940 all negotiations for disposition of the certificate had failed. The so-called negotiations in 1941 were nothing more than feelers to see if any interest could be aroused. The potential value which petitioner contends continued to exist until revocation of the certificate in October, 1942 was nothing more than wishful thinking. The

certificate could have been revoked at any time subsequent to 1939.³ One of the promoters of the project had already expressed the opinion in writing on December 2, 1940 that the stock of Central "became practically worthless in the early part of 1939." If the stock was practically worthless early in 1939 the indebtedness of Central to petitioner must have also been worthless. Certainly by the end of 1940 petitioner had nothing upon which to rely except the faint hope that some financial "angel" would purchase the certificate for at least \$32,867.81 (\$31,567.81 plus \$1,300). We can not believe that the ordinary prudent man would have considered the indebtedness or the stock investment as having value at January 1, 1942. On this issue we affirm the respondent.

In so deciding we have considered the authorities cited in the respective briefs. But, since this case must be decided, in the last analysis, upon its own particular facts, we have not relied upon any decided case, electing instead to base our decision upon

³Fuel was granted the certificate upon its representation that it would construct and operate a gas distributing system. The Railroad Commission expressly reserved, however, the right to revoke or limit the authorization as to territory not being served. Fuel ceased serving its customers November 11, 1937. It secured a temporary suspension of service on January 3, 1938 to complete within 60 to 120 days repairs to its pipe lines. Instead of making the repairs, Fuel sold its pipe line system and by the end of 1939 had no facilities whatsoever with which to serve its territory.

the findings of fact hereinabove set forth, which were made after carefully weighing the evidence in the light of the findings requested by both parties.

The remaining issue is whether petitioner can carry over a 1941 net operating loss and deduct it from its 1943 consolidated net income. Petitioner filed a separate return in 1941, and it had no income in 1943 which was included in the consolidated return filed for 1943. Under such circumstances section 23.31 (d) (3) of Regulations 104 provides that the net operating loss carry-over from a separate return year shall not exceed the sum of the corporate net income included in the consolidated net income tax year plus separate net capital gain of the consolidated income tax year. The stipulated facts show that petitioner had no net income for 1943 so that the limitation contained in the regulations, which petitioner accepted by filing the consolidated return, prevents any part of the 1941 net operating loss from being carried over as a deduction against 1943 consolidated net income. On this issue, too, we sustain the respondent.

Decision will be entered for the respondent.

[Seal]

Entered and served May 10, 1949.

Received May 6, 1949.

The Tax Court of the United States, Washington

Docket No. 13562

CAPITAL SERVICE, INC.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, entered May 10, 1949, it is

Ordered and Decided: That there is a deficiency in income tax of \$7,358.10 for the calendar year 1943.

[Seal] /s/ WILLIAM W. ARNOLD,

Judge.

Entered May 12, 1949.

Served May 13, 1949.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW OF A DECISION
OF THE TAX COURT OF THE UNITED
STATES BY THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT

I.

Jurisdiction

Capital Service, Inc., your petitioner, respectfully petitions the Honorable United States Court of Appeals for the Ninth Circuit to review the decision of the Tax Court of the United States entered on May 12, 1949, which finds a deficiency in income tax due from your petitioner for the calendar year of 1943, in the amount of \$7,358.10.

Your petitioner is a corporation organized under the laws of the State of California, having its principal office and place of business at 510 South Spring Street, Los Angeles 13, California.

The return of income tax in respect of which the aforementioned tax liability arose was filed by your petitioner with the Collector of Internal Revenue for the Sixth Collection District of California, located in the City of Los Angeles, State of California, which is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Jurisdiction of the United States Court of Appeals for the Ninth Circuit to review the decision of the Tax Court of the United States aforesaid is

founded on Section 1141 of the Internal Revenue Code (26 U.S.C.A., section 1141).

II.

Nature of the Controversy

Petitioner is a California corporation incorporated under the laws of the State of California on April 23, 1936, with its principal office and place of business at 510 South Spring Street, Los Angeles 13, California. Petitioner and petitioner's subsidiary, the A & W Baking Co. (name changed to Danish Maid Bakery), filed consolidated income tax returns with the Collector of Internal Revenue for the Sixth District of California for the calendar years 1942 and 1943.

Reflected in the computation of the 1942 net operating loss of petitioner were deductions of \$31,567.81, and \$1,300.00 representing, respectively, the worthlessness of an indebtedness owed to petitioner by, and stock held by petitioner in, Central California Public Utilities Corporation.

This case involves an income tax deficiency asserted against petitioner for the calendar year of 1943 in the amount of \$7,358.10.

The principal issue is whether petitioner sustained in the calendar year 1942 a net operating loss that could be carried over and used as a net operating loss deduction for the calendar year 1943.

The determination of the principal issue will turn upon whether it is held that the indebtedness owed to petitioner by, and the stock held by petitioner in,

said Central California Utilities Corporation became worthless during the calendar year 1942, as contended by petitioner, or prior to the beginning of said calendar year 1942 as determined by the Commissioner of Internal Revenue. The Tax Court of the United States affirmed the Commissioner of Internal Revenue on this issue.

/s/ HYMAN SMITH,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss.

Hyman Smith, being duly sworn, says:

I am the attorney for the petitioner in this proceeding; I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained there are true to the best of my knowledge, information, and belief. This petition is not filed for the purpose of delay, and I believe the petitioner is justly entitled to the relief sought.

/s/ HYMAN SMITH,

Subscribed and sworn to before me this 14th day of June, 1949.

[Seal] /s/ WILLIAM M. CRANDALL,
Notary Public in and for the County of Los Angeles, State of California.

Received and filed June 19, 1949, T.C.U.S.

[Title of Tax Court and Cause.]

NOTICE OF PETITION FOR REVIEW

To: Commissioner of Internal Revenue, Washington, D. C.; Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for Respondent,

You Are Hereby Notified that on or about the 15th day of June, 1949, a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause, was filed with the Clerk of Tax Court of the United States. A copy of the petition as filed is attached hereto and served upon you.

Dated June 17, 1949.

/s/ HYMAN SMITH,
Attorney for Petitioner.

State of California,
County of Los Angeles—ss.

Clemence Bowman, being first duly sworn, says: that affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 923 Chester Williams Building, 215 West 5th Street, Los Angeles 13, California; that on the 17th day of June, 1949, affiant served the hereinabove notice on the attorney

for the Commissioner of Internal Revenue, Respondent in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Commissioner of Internal Revenue, Respondent, at the office address of said attorney as follows: "Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C." and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made. That there is delivery service by the United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ CLEMENCE BOWMAN.

Subscribed and sworn to before me this 17th day of June, 1949.

[Seal] /s/ E. O. LEAKE,

Notary Public in and for the County of Los Angeles, State of California.

Received and filed June 20, 1949, T.C.U.S.

[Title of Tax Court and Cause.]

MOTION TO SUBSTITUTE COUNSEL

Comes now Petitioner, and respectfully shows:

That it desires to withdraw James L. Wood, Esquire, as Counsel of record herein, and to substitute Hyman Smith, Esquire, as Counsel of record;

That notice of said change of counsel of record has been given to said James L. Wood.

That the said Hyman Smith is duly admitted to practice before the above Honorable Tax Court of the United States.

That the address of the said Hyman Smith is 923 Chester Williams Building, 215 West 5th Street, Los Angeles 13, California.

Wherefore, Petitioner respectfully requests leave of this Court to withdraw James L. Wood, Esquire, as Counsel of record herein, and to substitute Hyman Smith, Esquire, of 923 Chester Williams Building, 215 West 5th Street, Los Angeles 13, California, as Counsel of record herein.

CAPITAL SERVICE, INC.

[Seal] /s/ M. B. PRICE,
Vice President, Petitioner.

I hereby agree to the foregoing substitution.

/s/ JAMES L. WOOD.

June 27th, 1949.

I, Hyman Smith, do hereby certify that I am duly admitted to practice before the Honorable Tax

Court of the United States and do hereby accept the foregoing substitution. I further certify that my mailing address is 923 Chester Williams Building, 215 West 5th Street, Los Angeles 13, California.

/s/ HYMAN SMITH.

June 27th, 1949.

Received and filed June 29, 1949, T.C.U.S.

Granted June 29, 1949.

/s/ BOLON B. TURNER,
Judge.

[Title of Tax Court and Cause.]

DESIGNATION OF RECORD, PROCEEDINGS
AND EVIDENCE TO BE CONTAINED IN
RECORD ON REVIEW PURSUANT TO
RULE 75 OF FEDERAL RULES OF CIVIL
PROCEDURE

To the Clerk of the Tax Court of the United States:

You Will Please Take Notice that petitioner and appellant, Capital Service, Inc., hereby designates for inclusion in the record on review in the above-entitled action, the complete record and all of the proceedings and evidence in the said action including the Judgment Roll, transcript of all testimony and other evidence and exhibits in the action.

The above notice is in accordance with Rule 75 of the Federal Rules of Civil Procedure.

Dated: June 14th, 1949.

/s/ HYMAN SMITH,

Attorney for Petitioner and Appellant, Capital Service, Inc.

State of California,

County of Los Angeles—ss.

Clemence Bowman, being first duly sworn, says: that affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 923 Chester Williams Building, 215 West 5th Street, Los Angeles 13, California; that on the 14th day of June, 1949, affiant served the hereinabove "Designation of Record, Proceedings and Evidence to Be Contained in Record on Review Pursuant to Rule 75 of Federal Rules of Civil Procedure" on the attorney for the Commissioner of Internal Revenue, Respondent in said action, by placing a true copy thereof in an envelope addressed to the attorney of record for said Commissioner of Internal Revenue, Respondent, at the office address of said attorney as follows: "Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington, D. C." and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States

Post Office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made. That there is delivery service by the United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ CLEMENCE BOWMAN.

Subscribed and sworn to before me this 14th day of June, 1949.

/s/ WILLIAM M. CRANDALL,
Notary Public in and for the County of Los Angeles, State of California.

Received and filed June 15, 1949, T.C.U.S.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 29, inclusive, constitute and are all of the original papers and proceedings on file in my office as the original and complete record in the proceeding before The Tax Court of the United States entitled "Capital Service, Inc., a corporation, Petitioner, v. Commissioner of Internal Revenue, Respondent," Docket No. 13562, and in which the petitioner in The Tax Court proceeding has initiated an appeal as above numbered and enti-

tled, together with a true copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 19th day of July, 1949.

[Seal) /s/ VICTOR S. MERSCH,
 Clerk.

[Endorsed]: No. 12302. United States Circuit Court of Appeals for the Ninth Circuit. Capital Service, Inc., a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 25, 1949.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

CCA No. 12302

CAPITAL SERVICE, INC., a Corporation,
Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF POINTS ON APPEAL

Comes Now the appellant, Capital Service, Inc., a corporation, and hereby states that it intends to rely on the points hereinbelow set forth in its appeal from the decision of the Tax Court of the United States to the United States Court of Appeals for the Ninth Circuit, to wit:

(1) The Tax Court of the United States erred in holding that petitioner's stock investment in and loan to the Central California Utilities Corporation became worthless prior to 1942.

(2) The Tax Court of the United States erred in holding that Petitioner-Appellant is not entitled to deduct in 1943 a net operating loss carry-over from 1942.

(3) The Tax Court of the United States erred in holding that Petitioner-Appellant is not entitled to carry over its 1941 net operating loss and to deduct from 1943 consolidated net income.

(4) The Tax Court of the United States erred in

holding that the certificate of public convenience and necessity issued by the Railroad Commission of California to Gas Fuel Service Company became worthless prior to 1942.

(5) The Tax Court of the United States erred in holding that Gas Fuel Service Company had no assets in 1942.

(6) The Tax Court of the United States erred in failing to hold that prior to the surrender of the certificate of convenience and necessity Gas Fuel Service Company stock was not worthless, and in failing to hold that said stock first became worthless upon the surrender of said certificate of convenience and necessity in 1942.

(7) The Tax Court of the United States erred in failing to hold that Petitioner-Appellant sustained a net operating loss in 1942.

(8) The Tax Court of the United States erred in relying upon an opinion of "one of the promoters of the project" as to the alleged worthlessness of certain stock.

(9) The Tax Court of the United States erred in admitting in evidence hearsay and opinion evidence.

(10) The Tax Court of the United States erred in its rulings as to the admissibility of evidence.

(11) The Tax Court of the United States erred in its findings of fact.

(12) The Tax Court of the United States erred in its conclusions of law.

(13) The Tax Court of the United States erred in its decision.

Dated: Los Angeles, California, August 11, 1949.

HYMAN SMITH and
WILLIAM STRONG.

By /s/ HYMAN SMITH,
Attorneys for Appellant.

State of California,
County of Los Angeles—ss.

Barnet M. Cooperman being first duly sworn, says: that affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 923 Chester Williams Building, 215 West 5th Street, Los Angeles 13, California; that on the 11th day of August, 1949, affiant served within Statement of Points on Appeal on the Respondent and Attorneys for Respondent, Commissioner of Internal Revenue, in said action, by placing true copies thereof in envelopes addressed to the Respondent and the attorney of record for said Respondent, at the office addresses of said Respondent and attorneys as follows: "Commissioner of Internal Revenue, Washington 25, D. C."; "Thereon L. Caudle, Assistant Attorney General, Department of Justice, Washington, 25,

D. C.”; “Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington 25, D. C.,” and then sealing said envelopes and depositing the same, with postage thereon fully prepaid in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made. That there is delivery service by the United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ BARNET M. COOPERMAN.

Subscribed and sworn to before me this 11th day of August, 1949.

[Seal] /s/ HYMAN SMITH,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires April 25, 1950.

[Endorsed]: Filed Aug. 13, 1949, U.S.C.A.

[Title of Court of Appeals and Cause.]

AMENDED DESIGNATION OF RECORD FOR
PRINTING ON APPEAL

Comes Now the appellant, Capital Service, Inc., a corporation, and hereby designates for inclusion in the printed record on review in the above-entitled action the entire and complete record and all of the exhibits and proceedings therein excepting and excluding the following:

(a) Respondent's exhibits I and J, which are respectively a letter from an Internal Revenue Agent dated November 22, 1940, and the reply thereto written by R. W. Moore, dated December 2, 1940.

(b) Respondent's exhibits N, O, P and Q which are the Corporate Income Tax Returns of Kettleman-Lakeview Oil and Gas Co., Ltd., for 1936, 1938, 1939 and 1940.

(c) Respondent's exhibits R, S, T, U and V which are the Corporate Income and Excess Profits Tax Returns of Central California Utilities Co. for the calendar years 1936 through 1940, inclusive.

(d) Respondent's Exhibits W, X, Y, Z, AA, BB, CC and DD, which are the Corporate Income and Excess Profits Tax Returns of Capital Service, Inc., for the years 1936 through 1943, inclusive.

(e) Respondent's exhibits EE, FF, GG, HH and II, which are the Income Tax Returns of the Gas Fuel Service Co. for the years 1936 through 1940, inclusive.

(f) All briefs submitted to the Tax Court of the United States by the parties herein.

Dated: Los Angeles, California, August 11, 1949.

HYMAN SMITH and
WILLIAM STRONG,

By /s/ WILLIAM STRONG,
Attorneys for Appellant, Capital Service, Inc., a
Corporation.

State of California,
County of Los Angeles—ss.

Barnet M. Cooperman being first duly sworn, says: that affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 923 Chester Williams Building, 215 West 5th Street, Los Angeles 13, California; that on the 11th day of August, 1949, affiant served the within amended Designation of Record for Printing on Appeal on the Respondent and Attorneys for Respondent, Commissioner of Internal Revenue, in said action, by placing true copies thereof in envelopes addressed to the Respondent and the attorneys of record for said Respondent, at the office addresses of said Respondent and attorneys as follows: "Commissioner of Internal Revenue, Washington 25, D. C."; "Thereon L. Caudle, Assistant Attorney General, Department of Justice, Washington 25, D. C."; "Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington 25, D. C.," and then sealing said envelopes and depositing the same, with postage thereon fully prepaid in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made. That there is delivery service by the United States mail at the place so ad-

dressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ BARNET M. COOPERMAN.

Subscribed and sworn to before me this 11th day of August, 1949.

[Seal] /s/ HYMAN SMITH,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires April 25, 1950.

[Endorsed]: Filed Aug. 13, 1949.

[Title of Court of Appeals and Cause.]

SUPPLEMENT TO AMENDED DESIGNATION OF RECORD FOR PRINTING ON APPEAL

Comes Now the appellant, Capital Service, Inc., a corporation, and hereby supplements its Amended Designation of Record for Printing on Appeal in the above-entitled action by adding thereto respondent's exhibits I and J which are respectively a letter from an Internal Revenue agent dated November 22, 1940, and the reply thereto written by R. W. Moore, dated December 2, 1940.

Appellant, Capital Service, Inc., a corporation, now instructs the clerk of the above-entitled court to include in the printed record on review in the

above-entitled action respondent's said exhibits I and J described hereinabove.

Dated, Los Angeles, California, August 29, 1949.

HYMAN SMITH and
WILLIAM STRONG.

By /s/ HYMAN SMITH,
Attorneys for Appellant.

State of California,
County of Los Angeles—ss.

Barnet M. Cooperman, being first duly sworn, says: that affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within above-entitled action; that affiant's business address is 923 Chester Williams Building, 215 West Fifth Street, Los Angeles 13, California; that on the 29th day of August, 1949, affiant served the within Supplement to Amended Designation of Record for Printing on Appeal on the Respondent and Attorneys for Respondent, Commissioner of Internal Revenue, in said action, by placing true copies thereof in envelopes addressed to the Respondent and the attorneys of record for said Respondent, at the office addresses of said Respondent and attorneys as follows: "Commissioner of Internal Revenue, Washington 25, D. C."; "Thereon L. Caudle, Assistant Attorney General, Department of Justice, Washington 25, D. C."; "Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, Washington 25, D. C.," and

then sealing said envelopes and depositing the same, with postage thereon fully prepaid in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made. That there is a delivery service by the United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ BARNET M. COOPERMAN.

Subscribed and sworn to before me this 29th day of August, 1949.

[Seal] /s/ HYMAN SMITH,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires April 25, 1950.

[Endorsed]: Filed Aug. 31, 1949.

PAUL P. O'BRIEN,
Clerk.

No. 12302

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CAPITAL SERVICE, INC., a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING BRIEF ON APPEAL.

HYMAN SMITH,

BARNET M. COOPERMAN,

923 Chester Williams Building, Los Angeles 13,

Attorneys for Petitioner.

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CLERK OF COURT

TOPICAL INDEX

| | PAGE |
|--|------|
| Jurisdictional statement | 1 |
| Statutes involved in this case..... | 2 |
| Statement of the case..... | 5 |
| Statement of facts..... | 6 |
| Argument | 19 |
| Point I. Preliminary statement as to the law governing this case | 19 |
| A. The question of when stock or an indebtedness becomes worthless is a question of fact..... | 19 |
| B. The test to be applied in the determination of when stock or an indebtedness becomes worthless is a practical, objective test, varying with the circumstances of each case; the taxpayer's attitude and conduct are not to be ignored..... | 20 |
| C. The taxpayer in a case of this type carries the burden of proving: (1) that the stock or debt is worthless; and (2) that the stock or debt became worthless in the year in which the deduction from gross income is taken | 22 |
| D. The determination of the Commissioner is presumptively correct only until the taxpayer proceeds with competent and relevant evidence in support of his position—then the issue depends wholly upon the evidence so adduced and the evidence to be adduced by the Commissioner | 23 |

| | |
|---|----|
| Point II. Competent and relevant evidence was adduced below proving that the stock and debt of Central had potential value on December 31, 1941, and that they became worthless in 1942; no evidence was introduced below which will support the finding of the Tax Court that the stock investment and indebtedness became worthless prior to January 1, 1942 | 24 |
| A. The fact that petitioner supplied capital to other enterprises after it had ceased so supplying Central does not support the finding of the Tax Court that the stock and indebtedness of Central became worthless prior to January 1, 1942..... | 25 |
| B. The sale in 1939 of the physical assets of Kettleman and Fuel is not a fact which supports the finding of the Tax Court that the stock and indebtedness of Central became worthless prior to January 1, 1942. The only asset of real value possessed by the Central System was the certificate of public convenience and necessity possessed by Fuel; this certificate was in full force and effect until October 6, 1942..... | 29 |
| C. The suspension on January 6, 1940, of the corporate charters of Fuel, Kettleman and Central does not support the finding of the Tax Court that the stock and indebtedness of Central became worthless prior to January 1, 1942..... | 33 |
| D. The letter written to Ralph Moore on November 22, 1940, by an agent of the Bureau of Internal Revenue, and Moore's letter in response thereto dated December 2, 1940, do not support the finding of the Tax Court that the stock and indebtedness of Central became worthless prior to January 1, 1942..... | 34 |

- E. There is no evidence to support the finding of the Tax Court that all negotiations for disposition of the certificate had failed by the end of 1940, and that the negotiations in 1941 were nothing more than "feelers" 38
- F. No evidence was introduced in the Tax Court from which it may be concluded that petitioner postponed taking its deduction for losses on the stock and indebtedness of Central until 1942, in order to obtain an unlawful tax advantage..... 39

Point III. The Tax Court, in making its decision, did not apply the correct principles of law..... 40

- A. The Tax Court did not correctly apply Sections 23(f) and (k) of the Internal Revenue Code..... 40
- B. The Tax Court, in making findings of fact upon which the decision is based, incorrectly resorted to hindsight judgment, instead of applying the practical, flexible test required by the United States Supreme Court in *Boehm v. Commissioner*..... 41
- C. The Tax Court, in making its decision, failed to apply the correct principles of law, as revealed by case authority binding upon the Tax Court..... 43

Conclusion 50

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|---|--------------------|
| Bay Cities Transportation Co. v. E. H. Warren et al., 26 C. R. C. 131 | 31 |
| Boehm v. Commissioner, 326 U. S. 287, 66 S. Ct. 120..... | 19, 20, 25, 40, 42 |
| Chesapeake & O. Ry. Co. v. Martin, 283 U. S. 209, 51 S. Ct. 453 | 28 |
| Cittadini v. Commissioner, 139 F. 2d 29..... | 19 |
| Dunbar v. Commissioner, 119 F. 2d 367..... | 22, 46 |
| Eaton v. Commissioner, 143 F. 2d 876..... | 44 |
| Ellis v. United States, 138 F. 2d 612..... | 37 |
| Hauss v. Lake Erie & W. R. Co., 105 Fed. 733..... | 28 |
| Jones v. Commissioner, 103 F. 2d 681..... | 29 |
| Lucas v. American Code Co., 289 U. S. 445, 50 S. Ct. 202..... | 20 |
| Miami Beach Bay Shore Co. v. Commissioner, 136 F. 2d 408.... | 43 |
| Nelson v. United States, 131 F. 2d 30..... | 45 |
| New York Life Ins. Co. v. Bacalis, 94 F. 2d 220..... | 37 |
| Olson, E. C., v. Commissioner, 10 T. C. 458..... | 42, 46, 49 |
| Perry v. Commissioner, 120 F. 2d 123..... | 23 |
| Raffold v. Commissioner, 153 F. 2d 168..... | 19 |
| Redman v. Commissioner, 155 F. 2d 319..... | 19, 21 |
| Rex v. Ledrew (1945), 1 D. L. R. 453..... | 37 |
| San Joaquin Brick Co. v. Commissioner, 130 F. 2d 220.... | 19, 22, 23 |
| Southern R. Co. v. Gray, 241 U. S. 333, 36 S. Ct. 558..... | 37 |
| Morton, Sterling, v. Commissioner, 38 B. T. A. 1270..... | 36 |
| Woody v. Utah etc. Co., 54 F. 2d 220..... | 37 |

| STATUTES | PAGE |
|--|------------------|
| Bank and Corporation Franchise Tax Act (California), (Deering's Gen. Laws, Act 8488, Sec. 32)..... | 3, 33 |
| Bank and Corporation Franchise Tax Act (California), (Deering's Gen. Laws, Act 8488, Sec. 33)..... | 4, 33 |
| Internal Revenue Code, Sec. 23(e), (26 U. S. C. A., Sec. 23(e)) | 19, 20 |
| Internal Revenue Code, Sec. 23(f), (26 U. S. C. A., Sec. 23(f)) | 2, 5, 19, 40, 51 |
| Internal Revenue Code, Sec. 23(k)(1), (26 U. S. C. A., Sec. 23(k)(1)) | 2, 5, 21, 40, 51 |
| Internal Revenue Code, Sec. 122(a), (26 U. S. C. A., Sec. 122(a)) | 2, 5 |
| Internal Revenue Code, Sec. 122(b)(2), (26 U. S. C. A., Sec. 122(b)(2)) | 2, 5 |
| Internal Revenue Code, Sec. 1141 (26 U. S. C. A., Sec. 1141) | 1 |

TREATISES

| | |
|--|--------|
| Jones on Evidence, Sec. 1314 et seq..... | 36 |
| Wigmore, Treatise on Evidence, Sec. 285 | 27, 28 |
| Wigmore, Treatise on Evidence, Sec. 902..... | 35 |
| Wigmore, Treatise on Evidence, Sec. 1018..... | 37 |
| Wigmore, Treatise on Evidence, Sec. 1018(a)..... | 37 |
| Wigmore, Treatise on Evidence, Sec. 1179..... | 28 |
| Wigmore, Treatise on Evidence, Sec. 2273..... | 28 |

No. 12302

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

CAPITAL SERVICE, INC., a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

OPENING BRIEF ON APPEAL.

Jurisdictional Statement.

This appeal involves the Federal Income tax liability of the petitioner for the calendar and taxable year 1943. Respondent has determined that a deficiency in the amount of \$7,358.10 exists for said year. The decision of the Tax Court of the United States sustained the determination of the respondent. The decision being appealed from was entered on May 12, 1949. The return of income tax, with respect to which this case has arisen, was filed by petitioner with the Collector of Internal Revenue for the Sixth Collection District of California, located in the City of Los Angeles, State of California. The case is brought to this Court by petition for review filed on June 15, 1949, pursuant to Section 1141 of the Internal Revenue Code (26 U. S. C. A., section 1141).

Statutes Involved in This Case.

Section 23, Internal Revenue Code. DEDUCTIONS FROM GROSS INCOME (26 U. S. C. A. Sec. 23):

“In computing net income there shall be allowed as deductions:

. . . (f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

. . . (k) *Bad Debts.* (1) *General Rule.* Debts which become worthless within the taxable year; or (in the discretion of the Commissioner) a reasonable addition to a reserve for bad debts; and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. This paragraph shall not apply in the case of a taxpayer, other than a bank, as defined in section 104, with respect to a debt evidenced by a security as defined in paragraph (3) of this subsection. This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection.”

Section 122, Internal Revenue Code. NET OPERATING LOSS DEDUCTION (26 U. S. C. A. Sec. 122):

“(a) *Definition of Net Operating Loss.*—As used in this section, the term ‘net operating loss’ means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) *Amount of Carry-back and Carry-over.* . . .
. . . (2) *Net operating loss carry-over.*—If for any taxable year the taxpayer has a net operating

loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6), and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year)."

BANK AND CORPORATION FRANCHISE TAX ACT (California) (Deering's Gen. Laws, Act. 8488):

"Section 32. *Suspension and forfeiture of corporate powers.*

"(a) [Powers, rights and privileges of delinquent corporation to be suspended or forfeited.] If any tax, or any portion thereof, together with penalties, and interest thereon, which is due and payable either at the time the return is required to be filed or on or before the fifteenth day of the ninth month following the close of the income year, is not paid on or before six o'clock p.m. on the last day of the twelfth month after the close of the income year or if any tax due

and payable upon notice and demand from the commissioner, together with penalties and interest thereon, is not paid on or before six o'clock p.m. on the last day of the eleventh month following the due date of such tax, except in case of jeopardy or fraud assessments, in which case, if such tax, interest and penalties are not paid within 40 days from the date such tax, penalties and interest are due and payable (unless the bond required by this act is filed to stay the collection of such tax, penalties and interest and such tax, interest and penalties are paid within 60 days after notice by the commissioner on taxpayer's petition for reassessment), the corporate powers, rights and privileges of the delinquent taxpayer, if it be a domestic bank or corporation, shall be suspended and shall be incapable of being exercised for any purpose or in any manner except for the purpose of amending the articles of incorporation to set forth a new name; if the delinquent taxpayer be a foreign bank or corporation the right to exercise its corporate powers, rights and privileges in this State shall be forfeited. . . ."

Section 33. *Revivor of corporate powers: Corporate name: Transfer of records and funds:*

"Any bank or corporation which has suffered the suspension or forfeiture provided for in the preceding section may be relieved therefrom upon making application therefor in writing to the commissioner and upon payment of the tax and the interest and penalties for nonpayment of which the suspension or forfeiture occurred, together with all other taxes, deficiencies, interest and penalties due under the act, and upon the issuance by the commissioner of a certificate of revivor. Application for such certificate on behalf of any domestic bank or corporation which has suffered such suspension may be made by any

stockholder or creditor or by a majority of the surviving trustees or directors thereof; application for such certificate may be made by any foreign bank or corporation which has suffered such forfeiture or by any stockholder or creditor thereof”

Statement of the Case.

Petitioner raises no question herein with respect to that portion of the opinion of the Tax Court in which it was held that petitioner is not entitled to carry over a 1941 net operating loss, a year for which petitioner filed a separate return, and deduct said loss in 1943, a year for which petitioner filed a consolidated return.

The sole question to be decided in this appeal is whether petitioner sustained in the calendar and taxable year 1942 a net operating loss, as defined in Section 122(a) of the Internal Revenue Code (26 U. S. C. A., section 122(a)), which may be carried over and used as a net operating loss deduction for the calendar and taxable year 1943, as provided for by Section 122(b)(2) of the Internal Revenue Code (26 U. S. C. A., section 122(b)(2)).

The determination of the question presented depends upon whether the indebtedness of \$31,567.81 owed to petitioner by, and stock at an adjusted cost basis of \$1,300 held by petitioner in, the Central California Utilities Corporation became worthless during the calendar and taxable year 1942, as contended by petitioner, thus permitting deductions to be made from the gross income of petitioner for the year 1942 under the provisions of Sections 23(k) and 23(f), respectively, of the Internal Revenue Code (26 U. S. C. A., Sections 23(k) and 23(f)), or prior to said calendar and taxable year, as contended by respondent.

The decision of the Tax Court of the United States, sustaining the determination of the respondent, is based upon a finding by the Tax Court that the debt owed to petitioner by and the stock held by petitioner in Central became worthless prior to 1942. It is the position of the petitioner that the Tax Court erred in sustaining the determination of the respondent in that:

- (1) The decision of the Tax Court is not supported by any evidence; and
- (2) The Tax Court, in making its decision, did not apply the correct principles of law.

Statement of Facts.

Central California Utilities Corporation, hereinafter referred to as Central, is a California corporation, formed on August 3, 1936, for the purpose of acquiring the assets and assuming the liabilities of the Inland Public Service Company, hereinafter referred to as Inland. Inland had owned since 1933 all of the issued and outstanding capital stock of the Gas Fuel Service Company and the Kettleman-Lakeview Oil and Gas Company, Ltd., both of which are California corporations, hereinafter referred to as Fuel and Kettleman, respectively. [Stip. of Facts, par. 5, Tr. p. 29.]

On August 28, 1933, the Railroad Commission of the State of California in Decision No. 26297 [Joint Ex. 2-B, Tr. 49] had granted to Fuel a Certificate of Public Convenience and Necessity authorizing it to distribute natural gas in the counties of Kings and Fresno, in the state of California, pursuant to ordinances passed by said counties.

The above mentioned decision of the Railroad Commission was supplemental to Decision No. 26178 of the Commission, dated July 21, 1933 [Joint Ex. 1-A, Tr. 32], in which the Commission had ordered [Tr. 47], over the opposition of the Coast Counties Gas and Electric Company, the West Side Natural Gas Company, and the Southern California Gas Company, that:

“ . . . public convenience and necessity require and will require the exercise by Gas Fuel Service Company of the rights and privileges granted to it under the franchises which it contemplates securing from the counties of Kings and Fresno, the construction and operation of the natural gas transmission and distribution systems and the service of natural gas under rates all as set forth in its amended Application No. 18672”

Coast Counties Gas and Electric Company and the West Side Natural Gas Company resisted Fuel's application because they were desirous themselves of obtaining the permission of the Railroad Commission to operate in the area set forth in Fuel's application. The Southern California Gas Company protested the granting of a certificate to Fuel, although it did not desire to serve agricultural power consumers in Fresno County, but was interested only in serving the Tulare Lake Bed area of Kings County. [Joint Ex. 1-A, Tr. 36-47.]

Evidence adduced in behalf of Fuel before the Railroad Commission indicated that the organizers of that company owned 1500 acres of potential gas and oil lands in the Dudley Ridge area of Kings county. These organizers, who were largely farmers, had three years earlier incorporated Kettleman for the purpose of developing their

properties. They had been able to bring in three wells on their properties, which produced approximately 20,000,000 cubic feet of natural gas daily. Of this amount of gas, only 1,000,000 cubic feet per day were sold under contract, this, in large part, going to the Pacific Gas and Electric Company. [Joint Ex. 1-A, Tr. 36-37.]

In order to dispose of the surplus gas, the land owners organized Fuel, and entered into a survey to determine the market for natural gas amongst the farmers of Kings and Fresno counties. At that time, most farmers were using electric power for irrigation pumping purposes. It was learned that the rates charged by the electric utility companies were so high as to render the use of electric power for irrigation pumping purposes economically unfeasible. [Joint Ex. 1-A, Tr. 37-38.]

Sensing the tremendous potential market which existed for the sale of natural gas for irrigation pumping purposes, Fuel applied to the Railroad Commission requesting that it issue its certificate that public convenience and necessity required Fuel to construct and operate a natural gas transmission and distribution system in Kings and Fresno counties. [Joint Ex. 1-A, Tr. 37.]

Fuel proposed to sell the gas for sixteen cents per thousand cubic feet in Kings county and for seventeen cents per thousand cubic feet in Fresno county; these rates were approximately eight cents lower than the rates proposed by the Coast Counties Gas and Electric Company and the West Side Natural Gas Company for service in the same area. Statistics were placed before the Railroad Commissioners by Fuel indicating that at the rates it had proposed, the farmer consumers of the gas would be able to satisfy

their irrigation pumping needs at a saving of from one-third to one-half of the amount previously paid by such consumers for electric power. [Joint Ex. No. 1-A, Tr. 38, 42-43.]

The franchises granted by the counties of Kings and Fresno in 1933 gave to Fuel the right to lay and maintain a gas distribution line within the territorial limits of each of the two counties. While the franchises thus granted were not exclusive, these franchises were in effect at all times material herein, and could have been exercised by Fuel at any time, so long as it held the certificate of public convenience and necessity. [Stip. of Facts, pars. 9 and 10, Tr. 30; Joint Ex. No. 3-C, Tr. 52; Joint Ex. No. 4-D, Tr. 56.]

After the granting of the certificate of public convenience and necessity, Fuel proceeded to lay approximately thirty-two miles of pipe line in Kings County, and began the distribution of gas. However, by the latter part of 1935, Inland and its two subsidiaries, Fuel and Kettleman, were in serious financial difficulty, and operations were discontinued. The three corporation system was in great need of working capital, current assets being valued at only \$1,800, while current liabilities as of December 31, 1935 amounted to \$60,000. Fixed assets were valued at the following figures: pipe lines \$44,740.78; general office equipment, \$463.98; meters, \$354.56; and miscellaneous equipment, \$407.55. Lands, leases, and wells had been valued at slightly in excess of \$1,000,000, but as of December 31, 1935, these assets were abandoned, because of the lack of working capital, and because Kettleman's only remaining well had blown out, thus depriving Fuel,

the distributing corporation, of its gas supply. At the time of cessation of operations, Fuel was serving only ten or fifteen customers. [Tr. 283-285, 288-289.]

The promoters of the Inland system approached one Ralph Moore in the latter part of 1935, seeking his assistance in the procurement of financial aid for the system. [Tr. 86.] Moore proceeded to investigate the prospects for making Inland a profitable operation. He was impressed with the same factors that had originally inspired the formation of Fuel, and the acquisition by that company of the certificate of public convenience and necessity, already referred to: he found that in Kings and Fresno Counties, an exceptionally favorable market for natural gas products existed, and that in the vicinity of this market, ample supplies of gas could be obtained. [Tr. 87, 94-100.] Moore conferred with the heads of various farmers' organizations, and with various potential industrial users of natural gas, and, as a result of such discussions, concluded that the utility system could sell from twenty-five to thirty million cubic feet of gas per day, for about seven months out of the year, that is to say during the period when irrigation pumping was necessary. [Tr. 99.]

As to the matter of an immediate supply of natural gas, Moore discovered that an agreement could be made with the owner of three wells which had, in the past, produced large quantities of gas, which had been sold to the Pacific Gas & Electric Company; the latter company had stopped purchasing gas from these owners. [Tr. 96-97.] In addition to these three wells, there were many others which had had to cease operations when the Pacific Gas & Electric Company had stopped purchasing in the area in question, and Moore felt optimistic as to the prospects

for obtaining a supply of natural gas sufficient to satisfy the potential market which he had ascertained existed in the two counties. [Tr. 100.]

It was Moore's considered opinion that a large natural gas utility system in Fresno and Kings counties could be created through a reorganization of Inland. In arriving at this conclusion, Moore took into consideration the certificate of public convenience and necessity that had been granted by the state of California to Fuel, and which gave the company the legal right to distribute natural gas in Fresno and Kings counties; he also took into account the results of his investigations in the area, which had revealed a great potential market for natural gas, and the existence of an extensive supply of gas in the same oil-rich area. Moore realized, however, that to take advantage of the three factors, the certificate, the market, and the supply, a considerable amount of capital would be needed. [Tr. 88, 94.]

Moore approached the Los Angeles investment firm of G. Brashears & Company, for the purpose of planning a means of raising capital for the Inland system. [Tr. 88.] At that time, G. Brashears & Company was in the process of organizing petitioner for the purpose of making small amounts of capital available to certain speculative enterprises in return for a stock interest in such enterprises. The business purpose of petitioner was not merely to loan money at interest, but was to obtain stock in the corporations to which money was loaned, so that a speculative profit might be realized by petitioner in the sale of its stock interest if the assisted corporation became successful. [Tr. 318-319, 330.]

As a result of the negotiations between Moore and G. Brashears & Company, petitioner made loans totalling \$39,611.71 to the Inland system, in conjunction with a plan of reorganization, as a result of which a new corporation, Central, acquired the assets and assumed the liabilities of Inland. The assets of Inland consisted only of stock in Fuel and Kettleman. [Joint Ex. No. 8-H, Tr. 73-75, 89.] The stock of Central was issued and distributed as follows: (a) 117,000 shares to the old Inland stockholders, one share of stock in Central being exchanged for three shares of stock in Inland; (b) 187,500 shares to petitioner, and (c) 62,500 shares to Ralph Moore. [Tr. 89-91.] The remaining authorized shares of Central were to be available for future sale. [Tr. 93.] Since 1936, petitioner has owned an additional 1,050 shares of stock in Central, which it carries at an adjusted cost basis of \$1,300; these shares are the remainder of 1,500 shares of Central which were purchased from H. A. Savage in settlement of a claim held by the latter. Four hundred and fifty of the shares which had been purchased from Savage were delivered by petitioner to Henry K. Elder, attorney at law, in satisfaction of the latter's claim against Fuel and Kettleman for legal services rendered them. [Resp. Ex. K, Tr. 298-299.]

Because petitioner was not in existence at the outset of negotiations between Moore and G. Brashears & Company, Moore and G. Brashears & Company loaned \$1,000 and \$3,000, respectively, to Inland, and were repaid by petitioner soon after it obtained corporate existence on August 23, 1936. [Tr. 182.] At no time after this initial phase did G. Brashears & Company have direct dealings or relations with the Inland-Central system.

Prior to the reorganization of Inland, the system had ceased operating entirely. [Tr. 98-99.] The misconception never existed that the loan by petitioner of \$39,611.71 would be a sufficient amount to develop the utility system which had been envisioned by Moore after his investigation and inspection of the project. The plan was to keep the certificate of public convenience and necessity possessed by Fuel alive until such time as the development of the utility system could be accomplished by public financing, or by the sale of the stock held by petitioner in Central to other interests which themselves would undertake the development of the utility system. [Tr. 232-234, 320.] Petitioner expected repayment of its loan and benefit from the stock held in Central only through the accomplishment of either of these objectives. [Tr. 232-234, 320.]

Testimony adduced in the trial court establishes that the stock of Central held by petitioner had no market value at the time the reorganization took place or at any time subsequent thereto, that the loan by petitioner to Central was purely speculative in nature, and that the physical assets of the utility system had little, if any, market value. [Tr. 218, 224, 232-234, 320; Joint Ex. No. 8-H, Tr. 75; Tr. 192-195, 233.] The value of the stock and the value of the note receivable by petitioner were of a potential nature only and this potential value could only mature into actual, realizable value if petitioner was successful in its effort to acquire capital with which the utility system could take full advantage of the certificate of public convenience and necessity possessed by Fuel, or, in the alternative, to sell the stock held by petitioner in Central to other interests which themselves would undertake the development of the utility system. [Tr. 232-234, 320.] The efforts of petitioner along these lines were continuous

from 1936 through the middle of 1942, as is amply revealed by the record.

The Central system was unsuccessful in bringing in producing wells upon the land leased through funds loaned by petitioner, but was able to obtain sufficient gas from a well known as Irma #1, which was located on adjoining land. [Tr. 101-102, 103-104.] It must be emphasized that service for so few customers was maintained solely for the purpose of keeping the certificate of public convenience and necessity possessed by Fuel in effect. [Tr. 234.]

Irma #1 was destroyed by blasting which occurred in conjunction with certain geophysical surveys being made in the area by the Shell Oil Company in May of 1937, and thereafter the Central system supplied its few customers with gas purchased from the Southern California Gas Company. [Tr. 104, 125-128.]

The distribution lines of fuel were second-hand when laid, and in extremely poor condition; moreover, the lines were in many places laid on the surface of the ground, and were thus exposed to the elements and other forms of damage. As a result of these conditions, the lines leaked so badly that only approximately 25% of the gas that had been purchased from the Southern California Gas Company was actually delivered to the customers of the Central system. [Tr. 128-129, 133.] In the fall of 1937, a flood, which further damaged the pipe line, occurred in the Tulare Lake district, in which the customers served by the Central system were located. [Tr. 133.] Thus, at the end of 1937, it was necessary to discontinue the limited operations in which the Central system was engaged.

The Central system accordingly applied for permission of the California Railroad Commission to temporarily discontinue service, stating as its ground the necessity for repairing the distribution lines. [Tr. 132; Joint Ex. No. 5-E, Tr. 63; Joint Ex. No. 6-F, Tr. 66.] The service was not thereafter re-instituted. After the flood conditions had subsided, petitioner was of the opinion that reinstatement of service to the few customers of the Central system would cost more than the benefits to be immediately derived therefrom would be worth; moreover, at that particular time, petitioner was interested in several other enterprises, which if not given immediate financial assistance, would have been lost. [Tr. 236-237, 323-327.] Since the only valuable asset of the Central system was the certificate of public convenience and necessity held by Fuel, and since, in petitioner's judgment, the certificate was not in danger of being rescinded by the Railroad Commission, in view of the fact that the Railroad Commission had given Fuel permission to temporarily discontinue service, petitioner allocated the limited funds at its disposal to the projects having the most pressing immediate need. [Tr. 323-327; Joint Ex. No. 6-F, Tr. 66.]

Beginning in 1938, Moore negotiated with the Pure Oil Company, the Fullerton Oil Company, the Superior Oil Company, and the Lincoln Petroleum Company, for the purpose of acquiring a supply of gas. [Tr. 109-111, 198.] Moore was specifically interested in an arrangement under the terms of which the Central system would

purchase gas, provided that the producing company or companies would lend Central the money with which to lay a new pipe line. [Tr. 109, 197-199.] Although there was no question as to the surplus gas possessed by or available to these various companies or their desire to sell at the price Moore offered, as the Southern California Gas Company was paying far less, no arrangement was consummated on the basis contemplated by Moore. [Tr. 111-112.]

During 1939 the physical assets of Kettleman and Fuel were disposed of. [Joint Ex. No. 8-H, Tr. 75, 192-194.] These assets were of little value when the reorganization of the Inland system was undertaken, as is borne out by the low price they brought on sale, and had never been looked upon by petitioner as an inducement for, or as security for, the loan and investment petitioner had made. [Tr. 236, 232-233; Joint Ex. No. 8-H, Tr. 75.] Petitioner considered that the only asset of real value possessed by the Central system was the certificate of convenience and necessity that had been issued to Fuel, and that certificate remained in full force and effect until October 6, 1942. [Tr. 320, 326; Joint Ex. No. 7-G, Tr. 71.]

On January 6, 1940, the corporate charters of Fuel, Kettleman and Central were suspended for non-payment of franchise taxes, and were not thereafter revived. [Resp. Ex. M, Tr. 372.] Petitioner, having a number of pressing demands on it for funds, decided that it would be a needless expense to pay such taxes on the corporations in

the Central system until operations were to be resumed, in view of the fact that at that time revivor could be accomplished by payment of the franchise taxes. [Tr. 236-237, 323-327.]

During the year 1941, petitioner carried on separate negotiations with Messrs. Raphael Dechter and Ben Dudley, looking toward a sale of petitioner's interest in the Central project to groups represented by Dechter and Dudley, respectively. Although no precise meeting of minds resulted from these negotiations, petitioner's expectation that a sale of its interest in Central could be consummated continued until the year 1942. [Tr. 165-177, 238-240; Pet. Ex. No. 28, Tr. 165; Pet. Ex. No. 29, Tr. 172.]

During the entire period between 1936 and 1942, three factors existed continuously which rendered the plan of petitioner for the development of the Central system possible of fulfillment: (1) the certificate of public convenience and necessity which gave Central, through its subsidiary, Fuel, the legal right to distribute and sell natural gas in Fresno and Kings counties; (2) the supply of natural gas in the area; (3) the potential market for that gas in Fresno and Kings counties. [Joint Ex. No. 1-A, Tr. 32; Joint Ex. No. 2-B, Tr. 49; Joint Ex. No. 7-G, Tr. 71; Tr. 111-112; Tr. 94-95, 99, 100.] The only element lacking was sufficient capital to take advantage of these three factors. [Tr. 88, 320.] The history of petitioner with respect to Central, between 1936 and 1942, is one of persistent effort to obtain capital in

the amounts necessary to fully develop the Central system, or, in the alternative, to sell profitably its interest to other entrepreneurs, who would themselves undertake the development of the utility system. [Tr. 320, 232.]

In 1942, the surplus gas supply that had existed prior to that year ceased to be available. This was a result of the nation's developing war effort, which had the twofold effect of increasing the demand for natural gas in the metropolitan, industrial areas of the state, and, at the same time, of taking large amounts of natural gas off the market entirely, pursuant to a repressuring program which returned millions of cubic feet of gas to the subterranean areas from which it came. [Tr. 350-351, 176-179.] Moreover, the impact of the war upon business conditions generally made it exceedingly difficult to obtain capital for a basically non-war enterprise which could not be converted to war use. [Tr. 322.]

These conditions led petitioner to conclude in 1942 that the venture should not be carried further, and that the speculation in which it had engaged had failed, resulting in the loss of the money that had been loaned to Central, and in the worthlessness of the stock held by petitioner in that company. [Tr. 322.] As a result of this conclusion, a letter was written in June of 1942 to the Railroad Commission of the State of California which resulted in the cancellation of the certificate of public convenience and necessity possessed by Fuel in October of the same year. [Pet. Ex. No. 37, Tr. 249; Joint Ex. No. 7-G, Tr. 71.]

ARGUMENT.

POINT I.

Preliminary Statement as to the Law Governing This Case.

A. The Question of When Stock or an Indebtedness Becomes Worthless Is a Question of Fact.

The question of when stock or an indebtedness becomes worthless is a question of *fact*, the determination with respect to which is reversible only if the finding of the lower court is not supported by substantial evidence. With respect to the factual nature of the question of when stock becomes worthless, see *San Joaquin Brick Co. v. Commissioner* (1942 U. S. C. A. 9th), 130 F. 2d 220, 225; *Boehm v. Commissioner* (1945), 326 U. S. 287, 292-293, 66 S. Ct. 120, 123-124. With respect to the factual nature of the question of when an indebtedness becomes worthless, see *Redman v. Commissioner* (1946 U. S. C. A. 1st), 155 F. 2d 319, 321; *Cittadini v. Commissioner* (1943 U. S. C. A. 4th), 139 F. 2d 29, 31; *Raffold v. Commissioner* (1946 U. S. C. A. 1st), 153 F. 2d 168, 171.

The plain language of Sections 23(e) and 23(f) of the Internal Revenue Code, and their counterparts in many preceding Revenue Acts, in speaking of losses "sustained during the taxable year," has made it abundantly clear that a loss incurred on the worthlessness of corporate stock, to be deductible under these sections, must have been sustained *in fact* during the taxable year. See *Boehm v. Commissioner, supra*, at 291-293, 66 S. Ct. 123-124.

B. The Test to Be Applied in the Determination of When Stock or an Indebtedness Becomes Worthless Is a Practical, Objective Test, Varying With the Circumstances of Each Case; the Taxpayer's Attitude and Conduct Are Not to Be Ignored.

In the *Boehm* case, it was contended by the taxpayer that a subjective rather than an objective test was to be employed in the determination of whether corporate stock became worthless during the taxable year, within the meaning of section 23(e) of the Internal Revenue Code. The Supreme Court of the United States rejected this contention, and referred to its own statement in *Lucas v. American Code Co.*, 289 U. S. 445, 449, 50 S. Ct. 202, 203, wherein the Court said:

“no definite legal test is provided by the statute for the determination of the year in which the loss is to be deducted. The general requirement that losses be deducted in the year in which they are sustained calls for a practical, not a legal, test.”

The Court further stated in the *Boehm* case, at 293, 66 S. Ct. 124:

“The standard for determining the year for deduction of a loss is thus a flexible, practical one, varying according to the circumstances of each case. The taxpayer's attitude and conduct are not to be ignored, but to codify them as the decisive factor in every case is to surround the clear language of Section 23(e) and the Treasury interpretations with an atmosphere of unreality and to impose grave obstacles to efficient tax administration.”

Prior to 1942, Section 23(k) of the Internal Revenue Code allowed a deduction for “debts ascertained to be worthless *and* charged off within the taxable year . . .” (Italics supplied.) The Court in the *Redman* case, *supra*, at 320, states:

“The test of ascertainment of worthlessness under Section 23(k) before the 1942 amendment was deemed to be a subjective test rather than an objective one, that is, the taxpayer was entitled to charge off a bad debt in the year that he determined the obligation to him to be worthless. He was not compelled to take his deduction in the year that the debt *actually* had become worthless but in the year that the hypothetical ‘reasonable man’ would consider the debt to be worthless.”

Section 23(k)(1) of the Internal Revenue Code, as amended by Section 124(a) of the Revenue Act of 1942 allows a deduction from gross income for “debts which become worthless within the taxable year; . . .” Subsection (d) of this amendment renders it effective with respect to taxable years beginning after December 31, 1938. In this regard, the *Redman* case, *supra*, states, at 320:

“By its amendment to Section 23(k), Congress has changed the standard for the determination of worthlessness by substituting for the subjective test of ascertainment of worthlessness, the objective test of *actual* worthlessness.” (Italics supplied.)

To summarize, then, the courts have held that the question of when stock or an indebtedness becomes worthless, for the purposes of obtaining a deduction from gross income, is one of *fact*, and that in the determination of the year in which such worthlessness occurs, a practical, flexible test is employed, under which all the factors, including the subjective factor, of a given case are taken into consideration.

C. The Taxpayer in a Case of This Type Carries the Burden of Proving: (1) That the Stock or Debt Is Worthless; and (2) That the Stock or Debt Became Worthless in the Year in Which the Deduction From Gross' Income Is Taken.

The burden of proof which rests upon the taxpayer who appeals in a case of this type from the determination of the Commissioner of Internal Revenue, is clearly delineated in the case of *Dunbar v. Commissioner* (1941 U. S. C. A. 7th), 119 F. 2d 367, 368-369, which is cited with approval by the United States Court of Appeals for the Ninth Circuit in the *San Joaquin* case, *supra*. The *Dunbar* case states, in substance, that the taxpayer carries the burden of proving: (1) That the stock or debt is worthless, and (2) that the stock or debt became worthless in the year in which the deduction from gross income is taken. As an amplification of the second point, the Court in the *Dunbar* case stated that the taxpayer, in order to demonstrate worthlessness in the year in which the deduction is taken, must prove that the stock or debt had some *intrinsic* or *potential* value at the close of the preceding year.

D. The Determination of the Commissioner Is Presumptively Correct Only Until the Taxpayer Proceeds With Competent and Relevant Evidence in Support of His Position—Then the Issue Depends Wholly Upon the Evidence so Adduced and the Evidence to Be Adduced by the Commissioner.

With respect to the question of the presumption favoring the determination of the Commissioner, and the effect of such a presumption upon the burden of proof of the taxpayer in a case of this type, this Court in *Perry v. Commissioner* (1941 U. S. C. A. 9th), 120 F. 2d 123, 124, stated:

“This finding [the determination of the Commissioner] is presumptively correct, that is, until the taxpayer proceeds with competent and relevant evidence to support his position, the determination of the Commissioner stands. When such evidence has been adduced the issue depends wholly upon the evidence so adduced, and the evidence to be adduced by the Commissioner. The Commissioner cannot rely upon his determination as evidence of its correctness either directly or as affecting the burden of proof.”

This Court stated in the *San Joaquin* case at 225, with respect to the same point:

“It has been pointed out that in claiming tax deductions the taxpayer must show clearly that he comes within the statute allowing such deduction. But once he presents competent and relevant evidence on every necessary element, the presumption of correctness of the Commissioner’s determination is no longer existent and the outcome of the case depends upon the determination of the trial body after the consideration of the evidence brought before it by both sides. When the evidence on both sides has been

adduced, and the Board makes its finding of facts, then the sole question presented to the Court, so far as the facts are concerned, is whether or not the Board's findings are supported by the evidence.

“If the taxpayer fails to present substantial evidence on every point necessary to entitle him to the deductions claimed, this Court upon petition for review necessarily will hold against their allowance. In so doing, we are not considering proof nor are we weighing evidence.”

POINT II.

Competent and Relevant Evidence Was Adduced Below Proving That the Stock and Debt of Central Had Potential Value on December 31, 1941, and That They Became Worthless in 1942; No Evidence Was Introduced Below Which Will Support the Finding of the Tax Court That the Stock Investment and Indebtedness Became Worthless Prior to January 1, 1942.

Aside from the joint exhibits of petitioner and respondent below, the *only* evidence introduced by respondent was the following: 1. A letter written to Ralph Moore on November 22, 1940, by an agent of the Bureau of Internal Revenue [Resp. Ex. I, Tr. 208]; 2. Moore's response thereto, dated December 2, 1940 [Resp. Ex. J, Tr. 210]; 3. A detailed audit of the books and records of Capital Service, Inc. as of April 30, 1940 [Resp. Ex. K, Tr. 293]; 4. An audit of the books and records of Capital Service, Inc. as of December 31, 1940, and supplementing the audit of April 30, 1940 [Resp. Ex. L, Tr. 310]; 5. The certificate of the Secretary of State of California, with respect to the franchise history of Cen-

tral, Fuel, and Kettleman [Resp. Ex. M, Tr. 372]; 6. The Income Tax Returns of Kettleman for 1936, 1938, 1939, and 1940 [Tr. 381]; 7. The Corporate Income and Excess Profits returns of Central for the years 1936 through 1940, inclusive [Tr. 381]; 8. The Corporate Income and Excess Profits Tax returns of Capital Service, Inc., for the years 1936 through 1943, inclusive [Tr. 381-382]; 9. The Corporate Income and Excess Profits Tax returns of Fuel for the years 1936 through 1940, inclusive. [Tr. 382-383.]

Petitioner will refer in the course of its argument, to this evidence, the evidence introduced by petitioner, and the effect of cross-examination of petitioner's witnesses by respondent's counsel.

A. The Fact That Petitioner Supplied Capital to Other Enterprises After It Had Ceased so Supplying Central Does Not Support the Finding of the Tax Court That the Stock and Indebtedness of Central Became Worthless Prior to January 1, 1942.

The Tax Court takes the position in its opinion that the fact that petitioner supplied capital to other enterprises in which it was interested, after it had ceased supplying Central with funds, is one of the facts which ". . . show that long prior to 1942, the promoters of Central had given up all real hope of continuing this venture." [Tr. 407-408.]

As was stated by the Supreme Court of the United States in the *Boehm* case, *supra*, in the determination of the question of when stock (and the same reasoning is applicable to debts) becomes worthless, the subjective factor, although not necessarily the decisive factor, is a

factor which is not to be ignored. For this reason it is important to indicate at this point that the above inference is not warranted by *any* of the evidence.

The testimony of petitioner's witnesses Woodard, and Brashears reveals that petitioner was interested in Timm Aircraft Corporation, and the Ful-Ton Truck Company, in addition to Central, and that small sums of money were loaned to Timm and Ful-Ton after January, 1938, when petitioner made its last loan to Central. [Tr. 236-237, 324.] However, no conclusions may logically be drawn from this particular fact, until *all* of the evidence adduced below on the point has been examined. The above named witnesses for petitioner gave uncontradicted testimony that: (1) Petitioner *never* had at its disposal funds in the amount that would have been necessary to develop a gas utility system on the scale contemplated by petitioner and Moore. [Tr. 232, 320, 325.] Petitioner invested some \$30,000 in the Central system for the purposes of (a) placing that system in a position which would enable it to be publicly financed through a sale of the authorized but unissued shares of Central, or, in the alternative, in a position which would allow petitioner to sell its stock interest in Central to others, who would themselves develop the utility, and (b) carrying on a minimal operation, so that the certificate of public convenience and necessity, the only asset of any value owned by the Central system, would be kept in full force and effect. [Tr. 320, 232-233, 236.] (2) Petitioner's capital resources were decidedly limited, and thus petitioner could

not materially alter the status of Central; however, the small capital transfusions which petitioner was able to muster for Timm and Ful-Ton *saved those ventures from being lost entirely.* [Tr. 325.]

On cross-examination of Mr. G. Brashears, respondent's counsel asked questions with respect to the volume of business done by G. Brashears & Company in 1935, and the "financial condition" of that Company in 1940 and 1941, in an effort to demonstrate that that Company had sufficient funds with which to finance Central, but did not do so because of a lack of confidence in the prospects of the system. [Tr. 331-335.] Brashears refused to state such facts from memory but offered to obtain books and records which would reveal this information, and which could be brought before the Court within fifteen minutes' time. This offer was declined. [Tr. 333.] It is submitted that no inference arises from Brashears' refusal to testify from memory, with respect to matters which had occurred nearly a decade earlier, that G. Brashears & Company and petitioner were financially able to lend money to Central, but considered the project so unworthy that no additional loans would be made. Such an inference is contrary to the direct and uncontradicted testimony of Messrs. Brashears and Woodard. [Tr. 325-327, 232.] Moreover, it is to be noted that Brashears did not fail to *produce* evidence, which failure normally gives rise to an inference against the party asked to produce evidence at his disposal. See Wigmore, *Treatise on Evidence*, Section 285. On the contrary, Brashears *offered* to produce

the best evidence of the financial condition of G. Brashears & Company, its books and records, but this offer was refused by respondent's counsel. [Tr. 333.] See Wigmore, *op. cit. supra*, Section 1179. As a matter of pressing this point to a logical conclusion, the fact that respondent's counsel refused to accept Brashears' offer to obtain the best evidence of the financial condition of G. Brashears & Company, its books and records, which could have been brought before the court in short order, gives rise to an inference against respondent's position. Wigmore, *op. cit. supra*, Sections 285 and 2273.

In summary of this point, the position of the Tax Court that the fact that petitioner supplied capital to Timm and Ful-Ton, after it had ceased so supplying Central, justifies the conclusion that “. . . long prior to 1942, the promoters of Central had given up all hope of continuing the venture,” is not supported by any evidence. The position of the Tax Court is contrary to the testimonial evidence of two witnesses for petitioner. The testimony of these witnesses was not contradicted by that of any other witness, nor was it impeached by cross-examination; moreover, the circumstances of the case do not justify an impeaching presumption against the credibility of these witnesses founded merely upon their relation to the petitioner. See *Hauss v. Lake Erie & W. R. Co.* (U. S. C. A. 5th), 105 Fed. 733, 735-736, the reasoning of which is approved by the Supreme Court of the United States in *Chesapeake & O. Ry. Co. v. Martin* (1931), 283 U. S. 209, 219, 51 S. Ct. 453, 457.

B. The Sale in 1939 of the Physical Assets of Kettleman and Fuel Is Not a Fact Which Supports the Finding of the Tax Court That the Stock and Indebtedness of Central Became Worthless Prior to January 1, 1942. The Only Asset of Real Value Possessed by the Central System Was the Certificate of Public Convenience and Necessity Possessed by Fuel; This Certificate Was in Full Force and Effect Until October 6, 1942.

In cases of this type, in which the question is the time when stock or an indebtedness becomes worthless, a determination must be made of the *identifiable event* which indicates that the value of the stock or indebtedness has been completely extinguished. See *Jones v. Commissioner* (1939 U. S. C. A. 9th), 103 F. 2d 681, 684, 685.

During 1939, the physical assets of Kettleman and Fuel, the wholly owned subsidiaries of Central, were disposed of. [Joint Ex. No. 8-H, Tr. 75; 192-194.] However, disposition of these assets cannot be regarded as the identifiable event indicating complete extinguishment of the value of the stock and debt of Central. The uncontradicted testimony of petitioner's witnesses, Ralph Moore, Woodard, and Brashears, clearly states that these assets had never been looked upon as an inducement for, or as security for, the loan and investment petitioner had made, as they were of little value when the reorganization of the Inland system was undertaken. [Tr. 101, 233, 236, 320.] The testimony of the above mentioned witnesses in this regard is corroborated by the low price the assets brought on sale. [Joint Ex. No. 8-H, Tr. 75, 192-194.]

Evidence adduced by petitioner below establishes that petitioner considered that the only asset of real value possessed by the Central system was the certificate of

convenience and necessity which had been issued to Fuel, and that certificate remained in full force and effect until October 6, 1942. [Tr. 320, 326; Joint Ex. No. 7-G, Tr. 71.]

The Tax Court does not discuss the valuation of the certificate of public convenience and necessity in specific terms in its opinion; however, the Tax Court makes the statement that: "The potential value which petitioner contends continued to exist until revocation of the certificate in October 1942 was nothing more than wishful thinking." [Tr. 408.] This statement, unmistakably the product of hindsight, is not supported by any evidence. It is petitioner's position that under the objective situation revealed in the record, the certificate was a potentially highly valuable asset, as valuable until 1942, as it had been in 1936, when it was the major factor which had induced petitioner to embark upon the project of revivifying the Inland system. The certificate represented the legal authority granted by the State of California to bring the source of gas and the users of the commodity together. [Joint Ex. No. 1-A, Tr. 32; Joint Ex. No. 2-B, Tr. 49.] It must be emphasized that: (1) Respondent at no place in the record attempted to deny the fact that a large potential market for natural gas existed in Fresno and Kings counties, and (2) large supplies of gas were available in these two counties throughout the time covered in this case.

Roy M. Bauer, who was qualified as an expert witness on the valuation of such certificates, stated on direct examination by counsel for petitioner that a corporation which held on January 1, 1942, a certificate of public convenience and necessity to distribute natural gas in

Fresno and Kings counties, and also had the possibility of raising funds, either through public or private financing, and had a source of gas supply, at prices enabling it to resell at a profit, and also a potential supply of customers in the area, was the possessor of an asset of potential value; it must also be pointed out that Bauer's expert opinion assumed that the corporation holding the certificate of public convenience and necessity had no employees, no physical assets or cash, and no office, and was actually in debt. [Tr. 340-344.] Respondent introduced no evidence which contradicted Bauer's testimony. Cross-examination did not weaken Bauer's opinion based on the above assumed facts, the existence of which facts is amply revealed in the record. [Tr. 354, 363.]

The practical value of the right granted in the form of the certificate of public convenience and necessity is not to be underestimated: From the positive point of view, gas could not be distributed in Fresno and Kings counties without the certificate [Tr. 344]; from the negative standpoint, no competing organization could have such a right unless it was able to satisfy the burden of proof required by the Railroad Commission: ". . . In all cases the burden is on the applicant to show public necessity, and if there is a substantial conflict in the evidence, it must be resolved against him. This is required in order that the commission may ascertain . . . that public necessity does actually exist." *Bay Cities Transportation Co. v. E. H. Warren et al.* (1925), 26 C. R. C. 131. 134. The Tax Court in overlooking the potential and prac-

tical value of such a right, takes a position that is not supported by any evidence, and is contrary to evidence introduced by petitioner which was uncontradicted and unimpeached.

Because the certificate of public convenience and necessity was ultimately never exercised, as a result of certain supervening factors, which will be discussed *post*, occurring as concomitants of the nation's war effort, there is no justification for the use of hindsight to negate the existence of value prior to the occurrence of such supervening factors; the use of hindsight in this situation is opposed to the rule laid down in the *Lucas* case, *supra*, wherein the United States Supreme Court held that a *practical* test was to be used in determining the year in which losses occur.

In summary of this point, then, it is the position of petitioner that the disposition in 1939 of the physical assets of Fuel and Kettleman, which assets were of negligible value, and which had never been looked upon as an inducement for, or security for, the loan and investment petitioner had made, is not an identifiable event which in any way indicates the extinguishment of the value of the stock and indebtedness of Central, and therefore the disposition of such assets does not support the decision of the Tax Court that the stock and indebtedness became worthless prior to January 1, 1942. Petitioner from the outset considered that the only asset of value possessed by the Inland-Central system was the certificate of convenience and necessity possessed by Fuel, and this asset was held until October 6, 1942.

C. The Suspension on January 6, 1940, of the Corporate Charters of Fuel, Kettleman, and Central Does Not Support the Finding of the Tax Court That the Stock and Indebtedness of Central Became Worthless Prior to January 1, 1942.

The Tax Court, in its opinion, recites the fact that on January 6, 1940, the corporate charters of Fuel, Kettleman, and Central were suspended and not thereafter revived as one of the facts which prove that: "Long prior to 1942 the promoters of Central had given up all real hope of continuing this venture." [Tr. 407-408.]

It is submitted that suspension of corporate powers does not logically support such a conclusion. Under the law of the state of California, when franchise taxes are not paid, the Secretary of State must *suspend* corporate powers until such time as payment is made—but, the existence of the corporation as such is not interfered with. [Resp. Ex. M, Tr. 372, and the Bank and Corporation Franchise Tax Act (Deering's Gen. Laws, Act 8488, Sec. 32).] A corporation is enabled to function with no restraint whatever upon payment of the delinquent taxes. (Deering's Gen. Laws, Act 8488, Sec. 33.) As stated *supra*, the testimony of witnesses for petitioner Woodard and Brashears clearly indicates that petitioner had pressing demands upon it for funds, and obviously it would have been a needless expense to pay current franchise taxes until operations were to be resumed. [Tr. 236-237, 323-327.]

Prior to the reorganization of the Inland system, the corporate powers of Kettleman and Fuel had been suspended for nonpayment of franchise taxes, and it is to be noted that such suspension, and the revivor which took place upon payment of the taxes, had no impeding effect

upon the later activities of these companies. [Resp. Ex. M, Tr. 373.] In the same fashion, the suspension of corporate powers imposed in January of 1940 could have been removed by payment of the franchise taxes due and owing, just prior to the resumption of operations.

It is unrealistic and impractical to construe the suspension of corporate powers as being an identifiable event indicating the extinguishment of the value of the stock and indebtedness, in view of the fact that the same factors which originally interested petitioner in the reorganization of the Inland system continued to exist after such suspension, and also in view of the fact that the legal effect of the suspension could have been completely remedied, as stated above.

D. **The Letter Written to Ralph Moore on November 22, 1940, by an Agent of the Bureau of Internal Revenue, and Moore's Letter in Response Thereto Dated December 2, 1940, Do Not Support the Finding of the Tax Court That the Stock and Indebtedness of Central Became Worthless Prior to January 1, 1942.**

The Tax Court, in arriving at the decision from which this appeal is taken, placed heavy reliance upon a letter written by Ralph Moore on December 2, 1940 [Resp. Ex. J, Tr. 210], in response to a letter of an agent of the Bureau of Internal Revenue requesting information with respect to the value of stock in Central [Resp. Ex. I, Tr. 208], in view of the fact that certain shareholders in Central had allegedly claimed that the stock became worthless in 1939. [Tr. 409.] Respondent also placed great importance upon this letter as it is one of the few pieces of evidence which might be placed in the balance as opposed to the case made by petitioner.

Technically, the letter of Moore was introduced by respondent's counsel as a means of impeaching the credibility of Moore; and, thus, the greatest effect the letter can have is to render the testimony of Moore valueless to petitioner. In the language of Wigmore, *op. cit. supra*, Section 902:

“. . . It is sufficient to note here that, in effect and primarily, it [a contradictory statement made by the same person at another time] neutralizes the statement on the stand by showing that the witness cannot be correct in both statements and is as likely to be wrong in the latter as in the former, and furthermore that his certain error in this one respect indicates a possibility of error upon other points.”

Let us examine Moore's letter to determine whether it actually impeaches his credibility, that is to say, to determine whether it recites information inconsistent with that elicited upon the witness stand.

Moore stated in his letter that the stock of Central became “practically worthless” in the early part of 1939. Moore did not state the sense in which he meant the statement—*i. e.*, he did not state whether he was speaking in terms of potential value, or market value, or liquidation value. It would be entirely consistent to maintain, as Moore did while on the witness stand, that the stock had a great potential value to petitioner until the year 1942, and to state, on the other hand, that the stock became “practically worthless” from the standpoint of market value or liquidating value, early in 1939; Moore in this fashion explained, on redirect examination, the seeming inconsistency between his statements on the stand, and his statement in the letter in question. [Tr. 215-226.]

This point is made clear in *Sterling Morton v. Commissioner* (1938), 38 B. T. A. 1270, wherein it was stated:

“The ultimate value of stock and conversely its worthlessness, will depend not only on its current liquidating value, but also on what value it may acquire in the future through foreseeable operations of the corporation. Both factors of value must be wiped out before we can definitely fix the loss. If the assets of the corporation exceed its liabilities, the stock has liquidating value. If its assets are less than its liabilities, but there is a reasonable hope and expectation that the assets will exceed the liabilities of the corporation in the future, its stock, while having no liquidating value, has a potential value and can not be said to be worthless. . . .”

Moore quite properly asserted in the letter that the certificate of public convenience and necessity had only a “questionable value,” such value being commensurate with the profit that might be earned through operations. Such a statement is far from revealing a sense of abandonment, and Moore’s activities, which will be discussed *post*, with respect to the utility, after the letter was written, refute such a connotation.

In any event, Moore’s letter could not be used by the Tax Court as proof of the value of the stock of Central, since Moore had not been qualified as an expert witness with respect to the question of the valuation of the stock. If Moore’s expression: “. . . [the] stock became practically worthless in the early part of 1939” was used by the Tax Court as evidence of the worthlessness of such stock, then the decision of the Tax Court is to that extent, at least, based upon incompetent opinion evidence. See *Jones on Evidence*, Section 1314 *et seq.* Apparently, the Tax

Court so used Moore's letter, as the statement, unsupported by any other evidence, is made: "If the stock was practically worthless early in 1939, the indebtedness of Central to petitioner must also have been worthless."

Aside from the question of the *competency* of Moore's expression of opinion in the letter with respect to the value of the stock of Central, as evidence of the value of the stock, it is the majority rule that prior inconsistent statements of a witness are not to be treated as having any substantive or independent testimonial value. See Wigmore, *op. cit. supra*, Section 1018; *Southern R. Co. v. Gray* (1916), 241 U. S. 333, 36 S. Ct. 558; *Woody v. Utah etc. Co.* (1931 U. S. C. A. 10th), 54 F. 2d 220; *New York Life Ins. Co. v. Bacalis* (1938 U. S. C. A. 5th), 94 F. 2d 200; *Ellis v. U. S.* (1943 U. S. C. A. 8th), 138 F. 2d 612; *Rex. v. Ledrew* (1945), 1 D. L. R. 453.

The rationale of this rule is based upon the fact that if the out of court declaration made by the witness, which is inconsistent with statements made on the witness stand, and which is introduced to impeach the witness, were used to prove the truth of the matter asserted therein, the hearsay rule would be violated. Wigmore, in Section 1018(a), states the proposition as follows:

"a) Since . . . it is 'the repugnancy of his evidence' that discredits him, (the witness) obviously the Prior Self-Contradiction is not used *assertively*; *i. e.* we are not asked to believe his prior statement as testimony, and we do not have to choose between the two (as we do choose in the case of ordinary Contradictions by other witnesses). We simply set the two against each other, perceive that both cannot be correct, and immediately conclude that he has erred in one or the other,—but without determining which

one. It is the repugnancy and inconsistency that demonstrates his error, and not the superior credibility of the prior statement. Thus we do not necessarily accept his former statement as replacing his present one; the one merely neutralizes the other as a trustworthy one.

“In short, the *prior statement is not primarily hearsay*, because it is not offered assertively, *i. e.* not testimonially. The Hearsay Rule simply forbids the use of extra-judicial utterances as credible testimonial assertions to be relied upon. It follows, therefore, that the use of Prior Self-Contradictions to discredit is not obnoxious to the Hearsay Rule.”

E. There Is No Evidence to Support the Finding of the Tax Court That All Negotiations for Disposition of the Certificate Had Failed by the End of 1940, and That the Negotiations in 1941 Were Nothing More Than “Feelers.”

The Court below in its opinion expressed the view that by the end of 1940:

“all negotiations for disposition of the certificate [held by Fuel] had failed. The so-called negotiations in 1941 were nothing more than feelers to see if any interest could be aroused.” [Tr. 408.]

This conclusion is completely unsupported by the evidence, and is contrary to evidence adduced by petitioner which is uncontradicted and unimpeached. [Pet. Ex. No. 28, Tr. 165; Pet. Ex. No. 29, Tr. 172; Tr. 164-165, 170-172, 173-177, 238-240.] The negotiations carried on by Ralph Moore with Dechter and Dudley are evidence that the Central project attracted serious financial interest and that consequently, there were reasonable expectations of either raising the capital needed, or of petitioner’s

selling out its position to other interests which themselves would seek to develop the project. The hindsight fact that neither Dechter nor Dudley followed through with his negotiations does not indicate that these expectations had disappeared. On the contrary, they continued to exist so long as the circumstances of the project and the general economic conditions remained unchanged, which they did, until the year 1942. [Tr. 322, 329, 350-351.]

F. No Evidence Was Introduced in the Tax Court From Which It May Be Concluded That Petitioner Postponed Taking Its Deduction for Losses on the Stock and Indebtedness of Central Until 1942, in Order to Obtain an Unlawful Tax Advantage.

The trend of the cross-examination by respondent's counsel indicates that respondent seeks to infer that petitioner postponed taking its deduction for losses on the stock and indebtedness of Central until 1942, in order to obtain an unlawful tax advantage. [Tr. 226-228.] It is to be noted, however, that the consolidated income for 1942 (\$5,685.22 for the Bakery and \$1,271.30 for petitioner), as determined by respondent, would have been more than completely eliminated by carrying forward net operating losses which respondent has stipulated existed for 1940 (\$17,846.84 for the Bakery and \$7,082.40 for petitioner) and 1941 (\$8,681.99 for the Bakery and \$2,752.49 for petitioner). [Stip. of Facts par. 2, Tr. 28.]

No evidence was introduced by respondent from which it may be concluded that petitioner expected large income for the years 1943 and 1944, as an off-set against which it desired a net operating loss carry-over arising out of the year 1942.

POINT III.

The Tax Court, in Making Its Decision, Did Not Apply the Correct Principles of Law.

There are certain principles of law, applicable to all cases involving the question of stock or debt worthlessness, that were disregarded by the Court below.

A. The Tax Court Did Not Correctly Apply Sections 23 (f) and (k) of the Internal Revenue Code.

The Court below in its opinion makes the statement: "If the stock was practically worthless early in 1939 the indebtedness of Central to petitioner must have also been worthless." [Tr. 409.] This statement reveals a loss of sight of the fact that deductions for worthlessness of stock and debts are not permitted under the provisions of the Internal Revenue Code unless the stock and debt are *entirely* worthless, in both the intrinsic and potential senses—that an asset is "practically worthless" is not enough. See Sections 23 (f) and (k) of the Internal Revenue Code (26 U. S. C. A., Sections 23 (f) and (k)), and *Boehm v. Commissioner, supra*.

Furthermore, the statement of the Tax Court that: "If the stock was practically worthless early in 1939 the indebtedness of Central to petitioner must have also been worthless," leads to the erroneous conclusion that the indebtedness was worthless to a greater degree than the stock. In order for the indebtedness to have become worthless, the stock must, of necessity, have first become worthless, not merely "practically worthless," as, under a fundamental principle of the law of corporations, creditors have priority over stockholders.

The Court also said:

“Certainly by the end of 1940, petitioner had nothing upon which to rely except the faint hope that some financial ‘angel’ would purchase the certificate for at least \$32,867.81 (\$31,567.81 plus \$1,300).” [Tr. 409.]

This statement is not only not supported by any evidence, but is also indicative of the same misconception as to the law with respect to worthlessness deductions for stock and bad debts under the provisions of the Internal Revenue Code. As has been indicated, *supra*, such deductions can only be made when the stock or debt in question becomes completely devoid of all value, both intrinsic and potential. The fact that by the end of 1940, a purchaser could not be found who would pay \$32,867.81 for the certificate is an irrelevant consideration since we are concerned in this case with the sole question of when complete and entire worthlessness occurred.

B. The Tax Court, in Making Findings of Fact Upon Which the Decision Is Based, Incorrectly Resorted to Hindsight Judgment, Instead of Applying the Practical, Flexible Test Required by the United States Supreme Court in *Boehm v. Commissioner*.

The opinion of the Tax Court reveals that the Court, in making findings of fact upon which the decision is based, was influenced by the hindsight consideration that petitioner’s plan for the development of the Central system never actually materialized. The Court stated in its opinion:

“The potential value which petitioner contends continued to exist until revocation of the certificate in October, 1942 was nothing more than wishful thinking.” [Tr. 408.]

Again the statement, already quoted, is made:

“Certainly by the end of 1940 petitioner had nothing upon which to rely except the faint hope that some financial ‘angel’ would purchase the certificate for at least \$32,867.81 (\$31,567.81 plus \$1,300).”

These statements are not supported by any evidence, and are unmistakably born of the wisdom possessed by all with respect to events long past.

The Supreme Court of the United States stated in the *Boehm* case, *supra*, that a practical, flexible, objective test was to be applied in the determination of when stock (and the same reasoning applies with respect to debts) becomes worthless. The Supreme Court also stated that the taxpayer’s judgment is not to be ignored in cases of this type.

In the instant case, the Tax Court completely disregarded the evidence adduced by petitioner with respect to the practical, objective situation, and with respect to the subjective confidence of petitioner in the Central project until the year 1942; this evidence was neither contradicted by evidence adduced by respondent, nor impeached by respondent. [Tr. 320-322, 340-344.]

It is thus impossible to conclude that the Court below applied, in making its decision, the test laid down by the United States Supreme Court.

Moreover, the Tax Court itself in the case of *E. C. Olsen v. Commissioner* (1948), 10 T. C. 458, which is practically identical in factual situation to the instant case, and which will be discussed more fully *post*, has rejected the use of hindsight judgment.

C. The Tax Court, in Making Its Decision, Failed to Apply the Correct Principles of Law, as Revealed by Case Authority Binding Upon the Tax Court.

Let us first consider *Miami Beach Bay Shore Co. v. Commissioner* (1943 U. S. C. A. 5th), 136 F. 2d 408. There, the issue was whether stock owned by the taxpayer became worthless in 1937, as the taxpayer contended, or in 1936 as the Commissioner claimed. The taxpayer had proved by "every person having practical knowledge of and connection with the company," that from 1936 when a petition was filed for reorganization under the provisions of the Bankruptcy Act, until 1937, when the stockholders by their resolution brought an end to all prospects of reorganization, there was the possibility of putting the corporation back on its feet. The Court said, at page 409:

"If the question for determination were whether the stock had, prior to the taxable year, lost the greater part of its value, we should readily agree with the Board. But that is not the question. As long as the stock has any value, either present or potential, the taxpayer may not claim a deduction on account of its value shrinkage. By the same token, the government may not deprive the taxpayer of its right to make the claim when the last vestige of value has disappeared."

The Court further said at 409-410:

"This presumption which attended the Commissioner's finding here was, however, not a permanent but a temporary presumption which disappeared in the light of controlling and undisputed fact that throughout 1936 and until the middle of the fiscal year 1937, when the stockholders by this resolution brought to an end all prospects of reorganization,

Again the statement, already quoted, is made:

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The Court further said at 409-410:

"This presumption which attended the Commissioner's finding here was, however, not a permanent but a temporary presumption which disappeared in the light of controlling and undisputed fact that throughout 1936 and until the middle of the fiscal year 1937, when the stockholders by this resolution brought to an end all prospects of reorganization,

there still was life in the company, there still was value, though potential only, in its stock. Congress in conferring the deduction in the general terms of Section 23 (f), and the Treasury in its Regulation 94, Revenue Act of 1936 did not set up a mere catch penny contrivance to be operated like a snare. It was expected that the loss thus allowed would be arrived at practically and by common sense methods, not by methods which break the promise to the hope while they keep it to the ear, and the courts and the Board have usually come up to that expectation." (The Court cited, among other cases, *Lucas v. American Code Co.*, *supra*.)

In *Eaton v. Commissioner* (1944 U. S. C. A. 5th), 143 F. 2d 876, the Commissioner had disallowed a deduction based upon worthlessness of stock. The corporation involved was *not* a going concern; however, it owned physical assets which witnesses had testified were worth considerable value. The Tax Court, however, had held in the face of this evidence that the liabilities of the corporation exceeded the value of its assets, and upheld the determination of the Commissioner. The Court reversed the Tax Court, and said, at page 877:

"We cannot say that the finding of the Tax Court that before 1937 it had become apparent that the company would not be revived is without support in the evidence. We think it quite clear, however, that this finding is not at all determinative of the question at issue here as to when the stock became worthless.

"For while the company was without value as a going concern, it did have assets of considerable value, and every witness who appraised them valued them in excess of the indebtedness. . . . As

we pointed out in the *Miami Beach case, supra*, the question for determination is not whether the stock had prior to the tax year lost the greater part of its value. As long as it has any value, either present or potential, the taxpayer may not claim a deduction on account of its value shrinkage. By the same token, the government may not deprive the taxpayer of its right to make the claim in the year when the last vestige of value has disappeared. Here until the bank refused to renew, remanded payment of its debt, and under the threat of foreclosure secured a conveyance of the property, there was not only hope, there was prospect that the company, and therefore, the stockholders, would realize something out of its physical properties. . . . If in 1936 or in any earlier year, the taxpayers had attempted to claim a deduction as for total loss of value of this stock, the commissioner could very properly have denied it on the ground that as long as the bank was carrying and renewing the mortgage, and not pressing foreclosure, the physical properties being what they were, no identifiable event had occurred marking the stock a total loss. When the taxpayer confronted at last with a firm demand for foreclosure, determined to give up the fight and surrender the property, then, but not until then, occurred the identifiable event on which a claim for loss could be based.”

In *Nelson v. U. S.* (1942 U. S. C. A. 8th), 131 F. 2d 301, 302, the Court said:

“The question [of stock worthlessness] is one of fact controlled by the evidence in this particular case. But certain principles applicable to all cases of this character may be adduced from the authori-

ties. . . . In the case of loss claimed because of the worthlessness of common stock of a corporation, actual worthlessness is the test. That the shares of stock may be worthless on liquidation is not decisive of the question. That common stock of a corporation has no value when its assets, fairly appraised are less than its liabilities unless, in such case, there is a prospect of improved conditions which will bring about the reverse. In the circumstances last mentioned, the stock has potential value and no loss for income tax purposes is realized by the owner until that potential value has disappeared. . . .

“ . . . Generally a taxpayer must prove some identifiable event which determines the time of actual loss. ‘This may be a single event or a series; and occurs usually when the property in question is sold or disposed of or its value otherwise extinguished.’ . . . (citing *Jones v. Commissioner, supra*, at 684).

“It has been said that this burden of proof is a difficult one at best and that the taxpayer should not be held to hard and fast technical rules in determining the precise time in which the loss occurred.” (Citing *Dunbar v. Commissioner* (1941 U. S. C. A. 7th), 119 F. 2d 367, 370.)

In concluding its opening brief, petitioner desires to call the attention of this Honorable Court to *E. C. Olson v. Commissioner* (1948), 10 T. C. 458, wherein, in a factual situation practically identical to that involved in the instant case, the Tax Court, in applying the foregoing principles of law, reached a decision completely *contra* to that arrived at by the Court in the instant case. In the *Olson* case, the Tax Court had to decide, among other things, whether: (1) The Commissioner erred in determining that the stock of the taxpayer in the Trask-

Willamette Company became worthless prior to 1941, and (2) Whether the Commissioner erred in disallowing a bad debt deduction in connection with a Trask-Willamette note.

The taxpayer was an individual; in 1935 taxpayer had been instrumental in incorporating the Trask-Willamette Company, for the purpose of logging on a certain tract in Oregon containing fire-damaged timber. The taxpayer purchased 250 shares of stock in the corporation, at \$100 per share. Much of the equipment owned by the corporation was under chattel mortgage to the Bank of California. The only other asset of the corporation was the contract giving it the right to log on the aforementioned tract; the contract covered a billion feet of timber at a good price.

Early operations of the company resulted in a deficit prior to 1939. In 1939, a second fire attacked the tract covered by the contract possessed by the corporation, which fire destroyed a number of the railroad bridges on the only railroad serving the tract. Much of the mortgaged equipment was destroyed in the fire; in 1940, the Bank of California brought foreclosure proceedings, and purchased the mortgaged property at the foreclosure sale; a deficiency of \$24,000 remained after the sale.

It is to be noted that resumption of logging would have required additional capital with which to procure equipment, and to rebuild the railroad or obtain trucks in its stead.

At the end of 1940, the only asset held by the corporation was its timber contract.

During 1941, all prospects of repairing the railroad or of procuring trucks vanished, and the taxpayer claimed

a loss on his stock in the company, contending that it had become wholly worthless in 1941.

In 1935, the taxpayer had loaned \$25,000 to the corporation, and had received a note secured by a chattel mortgage on certain logging equipment. The unpaid balance on the note in 1941 was \$8,969.30, and the taxpayer took a bad debt deduction in that year. As a result of the activity of the lumber industry during the war and immediately afterward, the amount unpaid on the note was met in 1946.

The Commissioner of Internal Revenue had disallowed both deductions taken in 1941.

The taxpayer testified in the Tax Court proceeding that even after the 1939 fire and the 1940 sale of the equipment, he still was of the opinion that the Trask-Willamette lumbering rights under the contract were of such profitable character, that he considered the possibility of obtaining capital with which to construct a road by means of which the timber could be removed from the tract by truck. Efforts were also being made to finance the railroad, and these efforts were not given up until 1941.

According to evidence introduced, the taxpayer was an outstanding business man, whose reputation indicated that he was possessed of sound judgment.

The Tax Court held, reversing the determination of the Commissioner, that the stock and debt of Trask-Willamette had prospective value on January 1, 1941, although obviously of only potential nature, and that

within the limits of reasonable judgment, based upon facts available to the taxpayer in 1941, and prior to his filing his income tax return for that year, both items became worthless during 1941. As already mentioned, *supra*, the Tax Court in this case disparaged the use of hindsight valuations.

The factual situations involved in the *Olson* case and in the instant case are practically identical. In both cases, an intangible right was the only asset owned by the corporation in which the taxpayer was interested, *i. e.*, in the *Olson* case, the only asset owned by Trask-Willamette after the 1939 fire, and the foreclosure proceedings in 1940, was the contract giving the corporation the right to lumber on a certain tract of land, while in the instant case, the only asset of the Central system, after the sale of the inconsequential physical assets of Fuel and Kettleman in 1939, was the certificate of public convenience of necessity held by Fuel, which asset was in full force and effect until 1942. In both cases, the only factor necessary to make use of the intangible rights held was that of a sufficient amount of capital. In both cases, if the capital had been obtained, there is no doubt that the stock and debt held by the taxpayers in each of the two cases would have been highly valuable assets.

In summary of this point, had the Tax Court applied, in making its decision, the correct principles of law, as revealed by the *Olson* case, and the other cases cited herein, it is clear that it could not have sustained the determination of the respondent.

Conclusion.

It is the position of petitioner that the stock and debt of Central had potential value in a practical, objective sense until 1942. During that year, as a direct result of the nation's war effort, the surplus gas which had been available in Fresno and Kings counties at all times herein mentioned, was taken for other uses. [Tr. 176-177, 350-351.] A tremendous quantity of gas was taken off the market entirely pursuant to a Federal repressuring program which had the purpose of enabling more oil to be pumped from the ground. [Tr. 350.] The gas that was not returned to the ground in accordance with this program, was in large part piped to Los Angeles and San Francisco, for use in war industry located in those two areas. [Tr. 176-178.] Moreover, the impact of the war upon general business conditions made it practically impossible to obtain capital for a basically non-war enterprise, such as that involved in the instant case, which could not be converted to war use. [Tr. 322, 329.] At this point, petitioner concluded that it would be impossible to realize upon its speculation. [Tr. 322, 329, 351-352.]

It is the contention of petitioner that the disappearance of the surplus gas, which was one of the key factors upon which the Central project had been based, the practical impossibility of raising capital for such a project, and the consequent letter of June 9, 1942, resulting in the revocation by the Railroad Commission of the certificate of public convenience and necessity held by Fuel, are the identifiable events which indicated that the value of the stock and indebtedness had been *completely extinguished*, and that until these events occurred, the Central project possessed a *potential* value which would not have permitted the

writing off of the above mentioned stock and indebtedness, under the provisions of Sections 23 (f) and (k) of the Internal Revenue Code (26 U. S. C. A., Secs. 23 (f) and (k)). [Pet. Ex. No. 37, Tr. 249; Joint Ex. No. 7-G, Tr. 71.]

The decision of the Tax Court, sustaining the determination of respondent that a deficiency in income tax in the amount of \$7,358.10 is owing by petitioner for the calendar and taxable year 1943, is erroneous in that: (1) The decision of the Tax Court is not supported by any evidence; and (2) The Tax Court, in making its decision, did not apply the correct principles of law. For these reasons, it is respectfully submitted, the decision of the Tax Court ought to be reversed and set aside.

Respectfully submitted,

HYMAN SMITH,

BARNET M. COOPERMAN,

Attorneys for Petitioner.

No. 12302

**In the United States Court of Appeals
for the Ninth Circuit**

CAPITAL SERVICE, INC., A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

Theron Lamar Caudle,
Assistant Attorney General.

Ellis N. Slack,
Robert N. Anderson,
S. Dee Hanson,

Special Assistants to the Attorney General.

FILED

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PAUL P. O'BRIEN,
CLERK

INDEX

| | Page |
|---|------|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 2 |
| Summary of argument..... | 13 |

Argument:

| | |
|--|----|
| The Tax Court correctly found that the taxpayer suffered the claimed bad debt and stock losses in question prior to 1942, <i>and</i> therefore they may not be carried forward and deducted as net operating losses for the taxable year 1943. | 14 |
| Conclusion | 32 |
| Appendix..... | 33 |

CITATIONS

Cases:

| | |
|--|------------|
| <i>American Trust Co. v. Commissioner</i> , 31 F. 2d 47 | 31 |
| <i>Atlantic Coast Line Railroad Co. v. Commissioner</i> , 4 T.C. 140 | 15 |
| <i>Balestrieri, Joe, & Co. v. Commissioner</i> , 177 F. 2d 867..... | 21, 28 |
| <i>Belser v. Commissioner</i> , 174 F. 2d 386, certiorari denied, 338 U. S. 893 | 15, 16, 22 |
| <i>Boehm v. Commissioner</i> , 326 U. S. 287..... | 16, 24 |
| <i>Commissioner v. Laughton</i> , 113 F. 2d 103..... | 16 |
| <i>Darling v. Commissioner</i> , 49 F. 2d 111, certiorari denied, 283 U. S. 866 | 23 |
| <i>De Loss v. Commissioner</i> , 28 F. 2d 803, certiorari denied, 279 U. S. 840 | 23 |
| <i>Dunbar v. Commissioner</i> , 119 F. 2d 367..... | 15 |
| <i>Elmhurst Cemetery Co. v. Commissioner</i> , 300 U. S. 37..... | 16 |
| <i>Friend. v. Commissioner</i> , 102 F. 2d 153..... | 28 |
| <i>Gowen v. Commissioner</i> , 65 F. 2d 923, certiorari denied, 290 U. S. 687 | 15 |
| <i>Grace Bros. v. Commissioner</i> , 173 F. 2d 170 | 21, 28 |
| <i>Helvering v. Gowran</i> , 302 U. S. 238 | 15 |
| <i>Helvering v. Kehoe</i> , 309 U. S. 277 | 16 |
| <i>Helvering v. Nat. Grocery Co.</i> , 304 U. S. 282..... | 16 |
| <i>Hirsch v. Commissioner</i> , 124 F. 2d 24..... | 15, 16, 23 |
| <i>Hull's Estate v. Commissioner</i> , 124 F. 2d 503, certiorari de- nied, 316 U. S. 690..... | 16 |
| <i>Interstate Circuit v. United States</i> , 306 U. S. 208 | 29 |
| <i>Jones v. Commissioner</i> , 103 F. 2d 681..... | 15, 16 |
| <i>Katz Underwear Co. v. United States</i> , 127 F. 2d 965 | 21 |
| <i>Lauriston Inv. Co. v. Commissioner</i> , 89 F. 2d 327..... | 16 |
| <i>Lee, H. D., Mercantile Co. v. Commissioner</i> , 79 F. 2d 391 | 23 |

Cases—Continued

| | Page |
|---|------------|
| <i>Leicht v. Commissioner</i> , 137 F. 2d 433..... | 16 |
| <i>Lucas v. American Code Co.</i> , 280 U. S. 445..... | 23 |
| <i>Mahler v. Commissioner</i> , 119 F. 2d 869, certiorari denied, 314 U. S. 660..... | 23 |
| <i>Morton v. Commissioner</i> , 112 F. 2d 320..... | 15 |
| <i>Person Const. Co. v. Commissioner</i> , 116 F. 2d 94..... | 23 |
| <i>Quock Ting v. United States</i> , 140 U. S. 417..... | 28 |
| <i>Ransome-Crummey Co. v. Superior Court</i> , 188 Cal. 393..... | 29 |
| <i>Reading Co. v. Commissioner</i> , 132 F. 2d 306, certiorari denied, 318 U. S. 778..... | 16 |
| <i>Royal Packing Co. v. Lucas</i> , 38 F. 2d 180..... | 16 |
| <i>San Joaquin Brick Co. v. Commissioner</i> , 130 F. 2d 220..... | 15, 16, 22 |
| <i>Sartor v. Arkansas Gas Corp.</i> , 321 U. S. 620..... | 28 |
| <i>Silvey v. Fink</i> , 99 Cal. App. 528..... | 29 |
| <i>Spero-Nelson v. Brown</i> , 175 F. 2d 86..... | 28 |
| <i>United States v. Gypsum Co.</i> , 333 U. S. 364, rehearing denied, 333 U. S. 869..... | 21 |
| <i>United States v. White Dental Co.</i> , 274 U. S. 398..... | 24 |
| <i>Van Landingham v. United Tuna Packers</i> , 189 Cal. 353..... | 29 |
| <i>Wilmington Co. v. Helvering</i> , 316 U. S. 164..... | 16 |

Statutes:

| | |
|---|----|
| Act of June 25, 1948, c. 646, 62 Stat. 869, Sec. 36..... | 21 |
| California Bank and Corporation Franchise Tax Act (3 Deering's General Laws, Act 8488): | |
| Sec. 32..... | 35 |
| Sec. 33..... | 29 |

Internal Revenue Code:

| | |
|--|-----------|
| Sec. 23 (26 U.S.C. 1946 ed., Sec. 23)..... | 2, 15, 33 |
| Sec. 122 (26 U.S.C. 1946 ed., Sec. 122)..... | 14, 34 |

Miscellaneous:

| | |
|--|--------|
| Federal Rules of Civil Procedure, Rule 52..... | 21 |
| Treasury Regulations 111: | |
| Sec. 29.23(e)-1..... | 22, 36 |
| Sec. 29.23(f)-1..... | 36 |
| Sec. 29.23(g)-1..... | 36 |
| Sec. 29.23(k)-1..... | 22, 37 |

**In the United States Court of Appeals
for the Ninth Circuit**

No. 12302

CAPITAL SERVICE, INC., A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 391-410) are not officially reported.

JURISDICTION

The petition for review herein (R. 412-414) involves federal corporate income tax for the year 1943 (R. 392, 411). On January 30, 1947, the Commissioner of Internal Revenue mailed to the taxpayer a notice of deficiency for that year in the total amount of \$7,358.10. (R. 9-16.) Within 90 days thereafter, on April 17, 1947, the taxpayer filed a petition and later on May 5, 1948, an amended petition with the Tax Court for redetermination of that deficiency, under the provisions of Section

272 of the Internal Revenue Code. (R. 4-16, 21-26.) The decision of the Tax Court sustaining the deficiency was entered May 12, 1949. (R. 411.) The case is brought to this Court by the taxpayer's petition for review filed June 15, 1949¹ (R. 412-414), pursuant to the provisions of Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether the taxpayer sustained a net operating loss in 1942 which it was entitled to carry forward and deduct from gross income for the taxable year 1943, under the provisions of Section 122 (a) and (b)(2) of the Internal Revenue Code.

The answer depends on whether the taxpayer sustained deductible losses in 1942 in the amount of \$1,300 on capital stock and in the amount of \$31,567.81 on a debt which allegedly became worthless during that year, within the meaning of Section 23 (f) and (k), respectively, of the Internal Revenue Code, resulting in a net operating loss for 1942.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations are printed in the Appendix, *infra*.

STATEMENT

The facts were found by the Tax Court upon the oral testimony, the documentary evidence, and the partially stipulated facts, as follows:² (R. 393-406):

The taxpayer is a California corporation, formed April 23, 1936. For the calendar years 1942 and 1943

¹ The record indicating that the taxpayer's petition for review was filed on June 19, 1949 (R. 414), is apparently in error for the docket entries and the taxpayer show that it was filed with the Tax Court on June 15, 1949 (R. 4; Pet. Br. 1).

² The findings of fact pertaining to another issue (R. 393-394), decided against the taxpayer (R. 410) and not appealed (R. 412-414; Pet. Br. 5), have been omitted.

it filed consolidated returns with the Collector of Internal Revenue for the Sixth District of California. The taxpayer's subsidiary, A. & W. Baking Company (name changed to Danish Maid Bakery), joined in filing the consolidated returns. (R. 393.)

In the 1942 consolidated return the subsidiary had a net income of \$5,685.22, exclusive of a net operating loss deduction; the taxpayer reported a net operating loss of \$27,492.98 for 1942. In arriving at that loss the taxpayer deducted, upon the grounds of worthlessness: (1) an indebtedness of \$31,567.81 owed to it by Central California Utilities Corporation; and (2) \$1,300 representing the adjusted basis to it of 1,050 shares of stock of that corporation. In the notice of deficiency herein the Commissioner disallowed the deductions, totaling \$32,867.81, and determined that, with \$4,103.53 of deductions not claimed by the taxpayer but allowed by the Commissioner, the taxpayer had an adjusted net income for 1942 of \$1,271.30, excluding net operating loss deductions. (R. 394.)

None of the income reported on the 1943 consolidated return of the taxpayer and its subsidiary, in the amount of \$122,566.32, represented income of the taxpayer. Adjustments by the Commissioner for 1943 resulted in his determination that the consolidated net income adjusted for 1943 was \$25,196.55 instead of the net loss of \$23,012.20 reported on the consolidated return. (R. 394.)

Central California Utilities Corporation, hereinafter referred to as Central, is a California corporation, formed August 3, 1936, for the purpose of taking over the assets and liabilities of the Inland Public Service Company, hereinafter referred to as Inland. Continuously after some time in 1933, and prior to the formation of Central in 1936, Inland owned all the issued and outstanding stock of Gas Fuel Service Company

and Kettleman Lakeview Oil and Gas Company, Ltd., hereinafter referred to as Gas Fuel and Kettleman, respectively. The primary function of Kettleman was to own producing wells and leases upon which such wells could be drilled, and to produce gas for sale. The primary purpose of Gas Fuel was to buy gas from Kettleman and others and distribute it for sale to customers in Kings and Fresno Counties, California. (R. 394-395.)

All of the issued and outstanding shares of Gas Fuel and Kettleman were acquired by Central from Inland on or about September 5, 1936. At all times material hereto such shares were the sole assets owned by Central. The certificate of dissolution of Inland was filed with the California Secretary of State on March 10, 1937. (R. 395.)

The early history of Gas Fuel and Kettleman is partially revealed by Decision 26178 of the Railroad Commission of California, 38 C.R.C. 875. It appears therein that on January 23, 1933, Gas Fuel asked the Commission for an order certifying that "public convenience and necessity require and will require the construction and operation of a natural gas transmission and distribution system for the service of natural gas to the agricultural power users in Fresno and Kings Counties and to exercise franchise rights which it contemplates acquiring from said counties." Three other companies resisted Gas Fuel's application and a series of public hearings were held by the Commission. The Commission's decision shows that in or about 1930 the organizers of Gas Fuel owned approximately 1,500 acres of potential oil and gas lands in the Dudley Ridge area of Kings County; that these owners organized Kettleman for the development of their properties; that at the time of the hearings (April and May, 1933) three producing gas wells were on the properties, which witnesses

estimated had a daily production of 20,000,000 cubic feet over a period of 20 years; that Gas Fuel sold under contract to Pacific Gas and Electric Company, hereinafter referred to as Pacific, 1,000,000 cubic feet of gas per day and small quantities of gas to others in the vicinity of the wells; that a survey of farmers of Kings and Fresno Counties, made to secure new outlets for its surplus gas production, indicated approximately 81 potential gas users who would secure an over-all saving of one-third to one-half of their present costs; that Gas Fuel proposed to sell gas at 16 cents per 1,000 cubic feet in Fresno County; that such rates were much lower than the rates of the opposing companies; that Gas Fuel would be farmer owned, controlled and managed; and that the estimated cost of installing its proposed transmission and distribution lines was approximately \$680,861. The Commission granted Gas Fuel's request and denied the requests of the resisting companies on July 21, 1933. (R. 395-396.)

During May 1933, Kings and Fresno Counties each granted Gas Fuel a franchise by ordinances, which ordinances have never been repealed. Each franchise gave Gas Fuel the non-exclusive right and privilege of using the County's streets, highways and alleys for the purpose of laying and maintaining a gas distribution line. Each franchise required work to commence thereunder within four months or the franchise "shall be declared forfeit." Each franchise required Gas Fuel, or its assigns, to pay the County after the fifth year, 2% of the gross annual receipts arising from the use of the franchise. (R. 396-397.)

Under date of August 28, 1933, the Railroad Commission of the State of California granted Gas Fuel a certificate of public convenience and necessity (R. 397)—

* * * authorizing said utility to exercise the rights and privileges granted to it under Ordinance

No. 151 of the County of Kings and Ordinance 290 of the County of Fresno, provided that the Commission may hereafter, by appropriate proceedings and orders, revoke or limit, as to territory not then served by Gas Fuel Service Company, or its successors in interest, the authority herein granted.

Following receipt of its certificate Gas Fuel laid approximately 32 miles of gas line in Kings County. Thereafter it distributed gas procured from Kettleman to its customers. Early in 1935 Kettleman's only gas well blew out depriving Gas Fuel of its gas supply. At the time Gas Fuel lost its gas supply it was serving 10 or 12 customers. (R. 397.)

By December 31, 1935, Inland was in financial difficulties. The combined book assets of Inland, Gas Fuel and Kettleman as of that date showed current assets of \$1,800 and current liabilities in excess of \$60,000. Other assets of the companies were valued on their books at December 31, 1935, as follows: pipe lines, \$44,740.78; meters and regulators, \$354.56; general office equipment, \$463.98; miscellaneous equipment, \$407.55; lands and leases, \$901,112.50; and wells, \$200,000. Subsequently, and as of December 31, 1935, the book values of lands, leases and wells were eliminated by quit-claims and abandonment. (R. 398.)

Late in 1935 or early in 1936 one of the promoters of Inland approached Ralph W. Moore seeking financial aid. Moore investigated Inland's condition and its prospects. His investigations convinced him that if Inland was reorganized and financed, it could become a very profitable operation. He found that Fresno and Kings Counties offered a practically unlimited market and that ample gas supplies appeared to be available within the area served by Gas Fuel or in nearby areas. He located three gas wells that could be purchased or leased, which, on the basis of prior production, would

provide an ample supply of gas. Two of the wells had been plugged with cement and one had been capped. Oil companies operating in or near Kings and Fresno Counties had had to shut down their gas wells because Pacific had ceased purchasing gas in the area, and Moore considered the shut down wells as a further source of supply. He became quite optimistic over Gas Fuel's prospects and succeeded in getting G. Brashears and Company, a Los Angeles firm engaged in selling securities, to put up \$20,000 to enable Inland to resume operations. G. Brashears and Company will hereinafter be referred to as Brashears. (R. 398-399.)

Moore and Brashears agreed that, after Inland's business was restored to an operating basis, a new company (Central) would be organized to acquire Inland's assets and liabilities. The plan of reorganization contemplated that the taxpayer would advance the money needed for the Inland project. Such sums as Moore and Brashears advanced temporarily were repaid by the taxpayer. Under the plan of reorganization Moore and Brashears were to have a 25% interest and a 75% interest, respectively, in the promotion stock, Inland stockholders were to receive stock of the new company (Central) and the remaining shares of the authorized issue were to be held for possible future sale to the public. The promotional stock represented over 50% of the shares entitled to vote. Such stock had no cost basis in the taxpayer's hands. Since some time in 1936 the taxpayer has owned 1,050 shares of Central's capital stock, which has an adjusted cost basis of \$1,300. (R. 399.)

After Central was organized and during 1936 the taxpayer made cash advances to or for its benefit totaling \$25,561.71, which included sums advanced by Moore and Brashears. Credits to this account during 1936 totaled \$5,311.71, leaving a balance due the taxpayer

on January 1, 1937, of \$20,250. During 1937 additional cash advances were made to Central by the taxpayer in the aggregate amount of \$14,000. Except for a \$50 advance on January 24, 1938, no further loans were made by the taxpayer to Central. The amount of Central's indebtedness to the taxpayer at January 31, 1938, was \$34,300. Credits to the account of \$1,900 on June 3, 1938, and \$832.19 on April 30, 1940, reduced the indebtedness to \$31,567.81, as of April 30, 1940, which was the amount finally charged off the taxpayer's books as a loss on December 31, 1942. (R. 399-400.)

The funds advanced by the taxpayer to Central enabled its subsidiary, Gas Fuel, to resume operation of its gas distributing system. A portion of the funds were used by Kettleman in an unsuccessful attempt to bring in its own gas wells, after which it obtained a supply of gas from a nearby capped gas well. This supply was ample for the limited number of customers then being served by Gas Fuel. On or about May 29, 1937, this well was destroyed by geophysical tests conducted by Shell Oil Company in nearby territory. On or about July 21, 1937, Gas Fuel contracted for a supply of gas from Southern California Gas Company, hereinafter referred to as Southern. Gas Fuel's contract with Southern was terminated on or about November 11, 1937, because Gas Fuel failed to pay for the gas. At that time Gas Fuel's gas bills exceeded \$1,100 and its bills were unpaid since the middle of August. At no time thereafter did Gas Fuel operate its gas distribution system. At the time Gas Fuel ceased operating its gas system it had about 10 customers. (R. 400-401.)

In November, 1937, Gas Fuel applied to the Railroad Commission of California for permission to temporarily discontinue its service in Kings County. Permission was granted by the Commission on January 3, 1938. In its opinion the Commission pointed out that the tre-

mendous line losses sustained by Gas Fuel³ "is entirely inexcusable and indicates gross inefficiency on the part of the applicant in the maintenance of its facilities." Gas Fuel was ordered to complete repairs to its lines and facilities as soon as possible and to file progress reports with the Commission at the end of each 30 days. Gas Fuel estimated that the repairs could be made in from 60 to 120 days at a cost of \$2,000. (R. 401.)

Gas Fuel notified Shell Oil Company, hereinafter referred to as Shell, by letter dated June 2, 1937, of the destruction of its gas supply by the acts of the latter's employees and demanded satisfaction from Shell. The extent and the nature of the negotiations with Shell are undisclosed but the taxpayer's account with Central shows a credit of \$1,900 on the latter's indebtedness under date of June 3, 1938, which represented an amount received in settlement of Gas Fuel's controversy with Shell. (R. 401.)

No attempt was made by Gas Fuel to repair its gas distribution system. Floods in 1938 further damaged the lines with the result that in 1939 Gas Fuel sold the pipe and all of its other physical assets. It sold its pipe lines for about \$2,500, the purchaser agreeing to pay Gas Fuel's taxes and turn over the receipted tax bill with his check for the difference. Central's account with the taxpayer shows that the difference amounted to \$832.19, which was credited on the taxpayer's books, April 30, 1940. Gas Fuel turned over its regulators, meters and a Chevrolet truck to one of its employees in satisfaction of unpaid wages. After disposing of these assets, Gas Fuel's sole remaining asset was its certificate of public convenience and necessity. (R. 401-402.)

³ Gas Fuel showed the Commission that it purchased 2,614,000 cubic feet of gas from Southern California Gas Company during October, 1937, while sales to its customers totaled 422,341 cubic feet, the difference being attributed to line losses.

By December 1, 1939, Kettleman was without property of any kind whatsoever and never thereafter acquired, owned or held any property. (R. 402.)

On or about January 6, 1940, the corporate charters of Central, Gas Fuel and Kettleman were suspended by the Secretary of State of California for failure to pay the State franchise tax. At all times thereafter these charters were suspended. (R. 402.)

Negotiations looking forward to securing a supply of gas for Gas Fuel were conducted by Moore with various individuals and oil companies during 1937 and thereafter. Moore's early negotiations were based upon the purchaser supplying the gas only; his later negotiations were based upon the purchaser supplying the gas and a new pipe line system for distribution. By December 31, 1940, all of these negotiations had proved fruitless. On March 25, 1941, and in August, 1941, he wrote letters to two separate individuals seeking unsuccessfully to interest them, their associates, or their clients in the project. (R. 402-403.)

During the interim between January 3, 1938 (when Gas Fuel was permitted temporarily to suspend its service), and October 6, 1942, the Railroad Commission repeatedly called upon Gas Fuel to advise it when Gas Fuel would resume service. Gas Fuel or Central gave the Commission various reasons for its failure to resume service to its customers. On October 8, 1938, the Commission was advised that the flooded condition of the land indicated that it would be well into the year 1939 before flood waters receded to a point where customers would require resumption of service for water pumping. In August, 1939, and in June, 1940, the Commission was advised that there was still no demand for gas for water-pumping purposes. On March 17, 1941, the Commission advised Central that if it intended to abandon service in its territory a formal application to

the Commission should be made. On March 25, 1941, Central replied that negotiations were under way looking forward to possible resumption of service, but that if the negotiations were not successfully concluded the abandonment of the "franchise" held by Gas Fuel would be taken up with the Commission. From October 15, 1941, to May 22, 1942, inclusive, the Railroad Commission wrote Central at least five letters requesting information about the status of Gas Fuel and when service to its customers would be resumed. On June 9, 1942, the Commission was advised that Gas Fuel "is no longer operating, having been inactive for the past three years." By order dated October 6, 1942, the Railroad Commission revoked Gas Fuel's certificate and referred in its opinion to Gas Fuel's letter of June 9, 1942, as one of the reasons for the revocation. (R. 403-404.)

In a letter to Moore on November 22, 1940, the Internal Revenue Agent in charge in Los Angeles stated that certain stockholders of Central had claimed that their stock became worthless in 1939. Moore was requested to "furnish information covering any event which in your opinion rendered the stock worthless. It is noted that the balance sheet of December 31, 1939 shows stock in subsidiaries, \$1,124,507.49." In his reply, dated December 2, 1940, Moore stated that the stock value of \$1,124,507.49 represented the book value of Gas Fuel and Kettleman, wholly owned subsidiaries; that Central had no assets other than the stock of its subsidiaries; that the subsidiaries had no assets of any nature except the "questionable value of its certificate of public necessity"; that the value thereof was commensurate with whatever profit Gas Fuel "might be able to earn from its operations, all of which now are suspended," and that it was his personal opinion as principal officer of the three corporations "that their

stock became practically worthless in the early part of 1939." (R. 404.)

The income tax returns of Kettleman, Gas Fuel, Central and taxpayer for the taxable years of 1936 to 1939, inclusive, show losses for each taxable year by each corporation.⁴ The income tax returns for 1940 of Kettleman, Gas Fuel and Central each contain the following statement: "Corporation dormant for past two years. No transactions of any nature in 1940. Corporate franchise cancelled for non-payment of state franchise in 1938." (R. 404-405.) The taxpayer's income tax returns for 1940 to 1943, inclusive, show losses as follows (R. 405):

| | | |
|-------|-------|------------|
| 1940 | | \$7,082.40 |
| 1941 | | 30.50 |
| 1942* | | 49,198.79 |
| 1943* | | 23,012.20 |

* Consolidated return filed with A. & W. Baking Company.

During 1937 the taxpayer invested in two other business enterprises in addition to Central. These investments were in Timm Aircraft Company and Ful-Ton Truck Company. The taxpayer disposed of its investment in Timm Aircraft in 1942 at a profit of \$5,650. Its investment in Ful-Ton Truck Company evolved eventually into its wholly-owned subsidiary, the A. & W. Bakery Company, a wholesale bakery. The taxpayer continued to finance the Aircraft Company and the Bakery Company after it ceased financing Central. (R. 405.)

The indebtedness of Central to the taxpayer and the stock owned by the taxpayer in Central became worthless prior to January 1, 1942. (R. 406.)

⁴ No tax return for Kettleman for 1937 was placed in evidence.

On the basis of the foregoing facts the Tax Court, affirming the Commissioner's determination (R. 9-16), held that the indebtedness and stock of the Central California Utilities Corporation owed to and owned by the taxpayer, respectively, became worthless prior to 1942 and that therefore the taxpayer is not entitled to the net operating loss carry-over based thereon claimed as a deduction for the taxable year 1943 (R. 406-410). The Tax Court thereupon entered its decision accordingly (R. 411), from which the taxpayer petitioned this Court for review (R. 412).

SUMMARY OF ARGUMENT

The Tax Court correctly found that the taxpayer suffered the claimed bad debt and stock losses in question prior to 1942, and therefore they may not be carried forward and deducted as net operating losses for the taxable year 1943. Since the ultimate question of worthlessness is clearly one of fact, the Tax Court's finding that the taxpayer failed to prove worthlessness of the two items in question in the critical year involved is conclusive upon review if there is substantial evidence to support it. The Tax Court, upon carefully weighing all the evidence, found a series of identifiable events specifically showing absence of either intrinsic or potential value and therefore complete worthlessness of both items before or during 1941, and the facts, as found, fully sustain its ultimate finding that they became worthless prior to January 1, 1942. Since the taxpayer has failed to prove anything to the contrary, the Tax Court's finding and decision should be affirmed upon review.

ARGUMENT

The Tax Court Correctly Found That the Taxpayer Suffered the Claimed Bad Debt and Stock Losses in Question Prior to 1942, and Therefore They May Not Be Carried Forward and Deducted as Net Operating Losses for the Taxable Year 1943

The sole question presented is whether the taxpayer sustained a net operating loss during the year 1942, as claimed. If it did, it is entitled to carry over and deduct such amount as a net operating loss for the taxable year 1943. Section 122 (a) and (b) (2) of the Internal Revenue Code, as amended (Appendix, *infra*). Whether or not the taxpayer actually suffered such loss in 1942 depends on whether the indebtedness and the shares of stock of Central here in question became worthless in that year. Such items comprised funds advanced by the taxpayer to Central in the total sum of \$30,567.81 during 1936-1938, and the adjusted cost basis of \$1,300 to the taxpayer of 1,050 shares of Central's stock acquired by it in 1936. (R. 394, 409.) The Commissioner determined that the amounts in question did not constitute proper deductions for loss and bad debt for the year 1942, under the provisions of Section 23 of the Internal Revenue Code (Appendix, *infra*), and that therefore the taxpayer had net income instead of a net operating loss carry-over for that year. (R. 11-16, 393, 394.) The Tax Court sustained his determination on the ground that the two items in question had become worthless before January 1, 1942. (R. 406-410.) The taxpayer contends that this was error because the decision of the Tax Court is not supported by any evidence, and is not in harmony with the correct principles of law applicable in such cases. (Br. 6, 19-49.)

Since the statute allows as deductions, in computing corporate net income, "losses sustained during the taxable year" with respect to securities which become

worthless during the taxable year, and "Debts which become worthless within the taxable year" (Sec. 23 (f) and (k) (1), respectively), the same factual considerations, criteria and legal principles apply for determining the year for taking deductions for stock losses and bad debts, that is, the year during which they actually become worthless. *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220, 225-226 (C. A. 9th); *Jones v. Commissioner*, 103, F. 2d 681, 684-685 (C. A. 9th); *Belser v. Commissioner*, 174 F. 2d 386, 390 (C. A. 2d), certiorari denied, 338 U. S. 893; *Atlantic Coast Line Railroad Co. v. Commissioner*, 4 T. C. 140, 155-156. Consequently, we discuss both items together.

There is no controversy that the two items in question were actually worthless *in* 1942, the issue being the specific year during which identifiable events occurred effecting worthlessness. It is our position that worthlessness of the two items and consequently the losses occurred prior to 1942, and that therefore the taxpayer is not entitled to the claimed net operating loss carry-over deduction for 1943. The taxpayer claims, however, that the identifiable event causing the two items to become worthless occurred during the year 1942, a contention it must prove, of course, in order to prevail. *Helvering v. Gowran*, 302 U. S. 238, 245; *Hirsch v. Commissioner*, 124 F. 2d 24, 28 (C. A. 9th); *Belser v. Commissioner*, 174 F. 2d 386, 389 (C. A. 4th), certiorari denied, 338 U. S. 893; *Gowen v. Commissioner*, 65 F. 2d 923, 924 (C. A. 6th), certiorari denied, 290 U. S. 687; *Dunbar v. Commissioner*, 119 F. 2d 367 (C. A. 7th); *Morton v. Commissioner*, 112 F. 2d 320 (C. A. 7th). Hence, it must meet the burden of showing the Commissioner's determination wrong by establishing that the two items in question had actual or at least potential value at the close of the preceding year (1941), and therefore in 1942. *San Joaquin Brick Co. v. Com-*

missioner, supra, pp. 225-226; *Dunbar v. Commissioner, supra*. Since the taxpayer does not claim that they had a present intrinsic value, the question is narrowed to a determination as to whether they had any "potential value at the close of the preceding year." (Pet. Br. 22, 24-39, 50-51.). Moreover, inasmuch as the ultimate question of worthlessness is purely a question of fact (Pet. Br. 19), the finding that the taxpayer failed to prove worthlessness in the critical year involved is conclusive upon review where, as here, there is substantial evidence to support it. *Boehm v. Commissioner*, 326 U. S. 287; *Wilmington Co. v. Helvering*, 316 U. S. 164; *Helvering v. Kehoe*, 309 U. S. 277, 279; *Helvering v. Nat. Grocery Co.*, 304 U. S. 282, 294; *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37; *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220, 225 (C. A. 9th); *Hirsch v. Commissioner*, 124 F. 2d 24 (C. A. 9th); *Commissioner v. Laughton*, 113 F. 2d 103, 105 (C. A. 9th); *Jones v. Commissioner*, 103 F. 2d 681, 684-685 (C. A. 9th); *Lauriston Inv. Co. v. Commissioner*, 89 F. 2d 327, 328 (C. A. 9th); *Royal Packing Co. v. Lucas*, 38 F. 2d 180, 181 (C. A. 9th); *Belser v. Commissioner*, 174 F. 2d 386, 389 (C. A. 4th), certiorari denied, 338 U. S. 893; *Hull's Estate v. Commissioner*, 124 F. 2d 503 (C. A. 2d), certiorari denied, 316 U. S. 690; *Reading Co. v. Commissioner*, 132 F. 2d 306 (C. A. 3d), certiorari denied, 318 U. S. 778; *Leicht v. Commissioner*, 137 F. 2d 433, 437 (C. A. 8th).

Since Central's sole assets at all times material here comprised the issued and outstanding shares of its two subsidiaries, Gas Fuel and Kettleman, taken over from Inland in 1936⁵ (R. 180-181, 210, 394-395), it follows

⁵ G. Brashears & Company was the top holding company of the several corporations involved herein, having acquired all the taxpayer's stock by the end of 1937. (R. 334-335, 398-399.) The taxpayer, in turn, owned the controlling interest in Central which

that whatever identifiable events occurred from time to time showing worthlessness of those shares up to 1941, inclusive, necessarily reflected worthlessness on or before December 31, 1941, of Central's shares owned by, and consequently of its indebtedness owed to, the taxpayer (R. 409). The Tax Court, upon carefully weighing all the evidence (R. 410), found a series of events specifically showing absence of either intrinsic or potential value and therefore complete worthlessness of the two items in question before or during 1941 (R. 394-405), and the facts, as found, fully sustain its ultimate finding that Central's indebtedness to and its stock owned by the taxpayer became worthless prior to January 1, 1942 (R. 406).

Facts specifically showing worthlessness of the two items prior to 1942 were found as follows: Kettleman's only gas well blew out early in 1935 thus depriving Gas Fuel of gas to supply its 10 or 12 customers. (R. 96, 299, 397.)⁶ The serious financial difficulties by the end of 1935 of Inland, Gas Fuel and Kettleman—taken over by Central in 1936 (R. 394-395)—showed that their combined liabilities exceeded their assets by more than \$58,000, and that their lands, leases and wells of a book value in excess of \$1,100,000 were eliminated by quitclaims and abandonment as of December 31, 1935. (R. 283-285, 288-289, 398.) The reorganization plan in 1936, under which Central was created to take over and operate the business of Inland (R. 394-395), and whereby the taxpayer acquired an additional 1,050 of Central's shares, proved totally unsuccessful (R. 205-207, 210,

was created in 1936 to take over the assets and liabilities of Inland (dissolved in 1937), comprising all the issued and outstanding shares of Gas Fuel and Kettleman, Central's sole assets. (R. 29, 89-90, 210, 298-299, 304, 311, 318-320, 394-395, 399.)

⁶ The record citations preceding page 391 refer to the evidence in support of these findings, showing absence of value and worthlessness of the two items in question prior to January 1, 1942.

298-299, 398-399, 400-403, 407-409; Pet. Br. 12). The taxpayer advanced large sums to Central during 1936 and 1937, and a final advance of only \$50 in January, 1938, resulting in a net indebtedness, never paid, of \$31,567.81 owed it by Central as of April 30, 1940. (R. 73-75.) This amount, however, the taxpayer, despite the absence of *anything* showing value after the end of 1940 (R. 359-361, 408-409), was not charged off as a loss by the taxpayer until December 31, 1942 (R. 399-400). Kettleman's attempts to bring in its own gas wells were unsuccessful (R. 101-107, 189-190), whereupon it obtained gas from another's well which was destroyed in May, 1937 (R. 103-104, 119-125). Thereafter, Gas Fuel contracted elsewhere for a gas supply (R. 104, 125-128), but the contract therefor was terminated less than four months later (November 11, 1937) by the vendor for non-payment of gas (R. 128-131), whereupon its gas distribution system supplying only about 10 customers ceased operating entirely (R. 128-129, 190, 400-401). All negotiations to revive Gas Fuel's business during 1937 and thereafter proved fruitless by the end of 1940, further attempts up to August, 1941, also having been unsuccessful. (R. 109-112, 164-174, 196-201, 213-214, 238-240, 402-403.) Gas Fuel requested in November, 1937, and was granted on January 3, 1938, by the California Railroad Commission permission to discontinue further services temporarily under circumstances found by the Commission showing gross inefficiency and waste in carrying on its business of distributing gas to its few customers, and on condition that it complete the repairs to its distributing lines and facilities as soon as possible. (R. 63-70, 401.) Gas Fuel, however, made no attempt to repair its gas distribution system, further damaged by floods in 1937 or 1938 (R. 133, 190-191), with the result that it sold all its assets in 1939 for a nominal amount (R. 193-194, 210-212), except its Certificate of

Public Convenience and Necessity (hereinafter called certificate) acquired in 1933, its sole remaining asset (R. 211, 299, 312, 401-402). After December 1, 1939, Kettleman was permanently without property of any kind (R. 75, 192-195, 211), and on or about January 6, 1940, and at all times thereafter its corporate charter and those of Central and Gas Fuel were suspended for failure to pay their state franchise taxes (R. 372-377, 379, 402).

The Tax Court found further that despite the promptings during 1938 to the early part of 1942, by the California Railroad Commission (R. 66-70, 140-141, 149-150, 153-154, 156-157, 160-162, 244-249), Gas Fuel and Central were unable to effect resumption of service to their customers as required by the conditions of the Certificate (R. 63-70, 398-403); and the Railroad Commission, upon being advised on June 9, 1942, that Gas Fuel had been inactive for three years and was no longer operating, revoked its certificate on October 6, 1942.⁷ (R. 71-72, 249-250, 403-404). Upon certain of Central's stockholders' claiming that their stock therein became worthless in 1939, the local Internal Revenue Agent in Charge requested R. W. Moore in a letter dated November 22, 1940 (R. 208-209, 404), to furnish information covering "any event" which he considered rendered such stock worthless in 1939, Mr. Moore, as principal officer of Central, Gas Fuel and Kettleman, advised him in a letter dated December 2, 1940, that while the stock of the two latter subsidiary corporations had a book value in excess of \$1,124,000, nevertheless the parent, Central,

⁷ The Railroad Commission's formal order of revocation of Gas Fuel's certificate on October 6, 1942 (R. 71-72, 404), is the only factor occurring in that year to which the taxpayer can point in support of its contention that Central's stock and indebtedness in question continued to have potential value until they became worthless upon formal revocation of Gas Fuel's certificate in 1942 (R. 404). This is dealt with more fully hereinafter.

had no assets other than the stock of those subsidiaries; that the subsidiaries, in turn, had no assets of any nature except (R. 211) "the questionable value of its certificate of public necessity" which had value only commensurate with whatever profit Gas Fuel might be able to earn from its operations, all of which were then suspended; and that it was his personal opinion that all three corporations' (R. 212) "stock became practically worthless in the early part of 1939" (R. 210-212, 404). This was consistent with the information reported in the income tax returns of those three corporations which showed losses consistently for each of the years 1936 to 1939, inclusive, and each of their returns for 1940 reported that the corporation had been dormant for the previous two years, without transactions of any nature in 1940, and that the corporate franchise had been cancelled for non-payment of state franchise taxes in 1938.⁸ (R. 404-405.)

Upon the basis of these findings, thus supported by substantial evidence of a long series of specific identifiable events showing complete worthlessness of the two items in question prior to 1942, the Tax Court found as an ultimate fact that (R. 406) :

The indebtedness of Central to petitioner and the stock owned by petitioner in Central became worthless prior to January 1, 1942.

It thereupon concluded as follows (R. 407, 408-410) :

We can not agree with petitioner. * * *
 * * * * *
 * * * at least by April 30, 1940 * * * the
 Central project was abandoned insofar as any additional investment of funds was concerned. * * *
 One of the promoters of the project had already ex-

⁸ The taxpayer's returns filed for the years 1936 to 1943, inclusive, of which those for 1942 and 1943 were consolidated returns, also showed losses for each year. (R. 394, 404-405.)

pressed the opinion in writing on December 2, 1940 that the stock of Central "became practically worthless in the early part of 1939." If the stock was practically worthless early in 1939 the indebtedness of Central to petitioner must have also been worthless. Certainly by the end of 1940 petitioner had nothing upon which to rely except the faint hope that some financial "angel" would purchase the certificate for at least \$32,867.81 (\$31,567.81 plus \$1,300). We can not believe that the ordinary prudent man would have considered the indebtedness or the stock investment as having value at January 1, 1942. On this issue we affirm the respondent.

In so deciding we * * * base our decision upon the findings of fact * * * which were made after carefully weighing the evidence * * *.

These findings and conclusions, sustaining the Commissioner's determination, are entitled to finality unless "clearly erroneous". Rule 52 (a), Federal Rules of Civil Procedure;⁹ *United States v. Gypsum Co.*, 333 U. S. 364, 394-395, rehearing denied, 333 U. S. 869; *Joe Balestrieri & Co. v. Commissioner*, 177 F. 2d 867, 873 (C.A. 9th); *Grace Bros. v. Commissioner*, 173 F. 2d 170, 173 (C.A. 9th); *Katz Underwear Co. v. United States*, 127 F. 2d 965 (C.A. 3d). The taxpayer has not shown that they are in any-wise erroneous. They should therefore "not be set aside" (Rule 52 (a), *supra*), a comprehensive review of the entire evidence of record failing to result in "the definite and firm conviction that a mistake has been committed" (*United States v. Gypsum Co.*, *supra*, p. 395; *Grace Bros v. Commissioner*,

⁹ Section 36 of the Act of June 25, 1948, c. 646. 62 Stat. 869, which amended Section 1141 (a) of the Internal Revenue Code, provides that the Courts of Appeals shall have jurisdiction to review the decisions of the Tax Court in the same manner and to the same extent as decisions of the District Courts in civil actions tried without a jury. *Joe Balestrieri & Co. v. Commissioner*, 177 F. 2d 867, 873 (C.A. 9th).

supra). Moreover, since the Tax Court's "findings are supported by the evidence", and "the taxpayer fails to present substantial evidence on every point necessary to entitle him to the deductions claimed, this Court * * * will hold against their allowance". *San Joaquin Brick Co. v. Commissioner*, 130 F. 2d 220, 225 (C.A. 9th); *Belser v. Commissioner*, 174 F. 2d 386, 390 (C.A. 4th), certiorari denied, 338 U. S. 893.

In these circumstances, it is plain that there were many identifiable events demonstrating that both the stock and the indebtedness in question were utterly worthless at least after December 31, 1939, and in any event at the end of 1941. This is true unless the taxpayer can show that Gas Fuel could obtain a gas supply and the necessary finances with which to construct a new gas distribution system to serve its customers, and thereby utilize its certificate claimed as being potentially valuable. As shown, however, the facts establish the contrary, and that the probability of such results after 1939 was entirely too remote and speculative to be relied upon as giving any value, potential or otherwise, to Gas Fuel's certificate and, in turn, to the taxpayer's stock and debt on or before December 31, 1941, much less thereafter. (R. 359-361.) The taxpayer was advised in a letter from its own certified public accountants, Thomas & Moore (R. 310-313), that as early as February 4, 1941, "The Investment [in the stock of Central] is of doubtful value" (R. 312). Moreover, the facts show that Central and its two wholly-owned subsidiaries were hopelessly insolvent as early as 1939, and in any event long before 1941 (R. 397-406), and therefore there was no value whatever left in Gas Fuel's certificate or in the taxpayer's shares and indebtedness of Central by January 1, 1942. Sections 29.23 (e)-1 and 29.23 (k)-1 of Treasury Regulations 111 (Appendix, *infra*). Accordingly, it is clear that the stock

and consequently the indebtedness in question became totally worthless before December 31, 1941 (R. 409), and that therefore the aggregate amount thereof may not properly be considered a net operating loss sustained during 1942, under the provisions of the pertinent statute and Regulations (Section 23 (f) and (k) (1) of the Internal Revenue Code; Sections 29.23 (e)-1 and 29.23 (f)-1 of Treasury Regulations 111 (Appendix, *infra*)), which may be carried forward and deducted for the taxable year 1943, under the provisions of Section 122 (a) and (b) (2) of the Code.

It is settled that a taxpayer may not select the year in which he will claim his loss deduction; he must claim it for the year in which it was actually sustained and not for some other year when the deduction may be more advantageous. *Lucas v. American Code Co.*, 280 U. S. 445; *Belser v. Commissioner*, *supra*, p. 390; *Mahler v. Commissioner*, 119 F. 2d 869 (C. A. 2d), certiorari denied, 314 U. S. 660; *cf. DeLoss v. Commissioner*, 28 F. 2d 803, 804 (C. A. 2d), certiorari denied, 279 U. S. 840. It has been held that a taxpayer may not close his eyes to the obvious and thereby attempt to take a loss deduction for worthless stock or a bad debt for a year subsequent to that in which it became worthless. *Hirsch v. Commissioner*, 124 F. 2d 24, 31 (C. A. 9th); *Mahler v. Commissioner*, *supra*; *Darling v. Commissioner*, 49 F. 2d 111 (C. A. 4th), certiorari denied, 283 U. S. 866. Moreover, a taxpayer may not, for business reasons or through friendly motives fail to attempt timely to recoup his losses from a defaulter, as here, so that the loss may occur in a later year of larger income when it would be more advantageous. *Person Const. Co. v. Commissioner*, 116 F. 2d 94, 95 (C. A. 7th); *H. D. Lee Mercantile Co. v. Commissioner*, 79 F. 2d 391, 393 (C. A. 10th). The exercise of a tax-

payer's own judgment as to when he will effect and take his deduction usually "results in the loss falling in the year of his largest income—seldom if ever in the year when the operation of his business resulted in a loss." *Person Const. Co. v. Commissioner, supra*, p. 95. The correst test was stated in *United States v. White Dental Co.*, 274 U. S. 398, 401, 403, as follows:

The statute obviously does not contemplate and the regulations (Art. 144) forbid the deduction of losses resulting from the mere fluctuation in value of property owned by the taxpayer. * * * But with equal certainty they do contemplate the deduction from gross income of losses, which are fixed by identifiable events, such as the sale of property * * * or, in the case of debts, by the occurrence of such events as prevent their collection (Art. 151).

* * * * *

The Taxing Act does not require the taxpayer to be an incorrigible optimist.

We have shown here a series of identifiable events fixing worthlessness of the two items in question long before the year 1942, and a fact picture indicating knowledge on the part of the taxpayer of such worthlessness during that time. As stated in *Boehm v. Commissioner*, 326 U. S. 287, 292:

Such an issue of necessity requires a practical approach, all pertinent facts and circumstances being open to inspection and consideration regardless of their objective or subjective nature. * * *

As against the foregoing showing of complete worthlessness of the two items in question prior to 1942, the taxpayer contends, substantially as it did in the Tax Court (R. 406-407), that Gas Fuel's single remaining asset, the certificate, had potential value—which, in

turn, gave value to Central's stock and indebtedness in question—until revocation of the certificate on October 6, 1942, and that *that* was the identifiable event which completely extinguished all value and fixed worthlessness of the two items in question in that year (Br. 24-25, 29-32, 50-51). It claims, incongruously, that none of the following salient facts support the Tax Court's finding of worthlessness prior to January 1, 1942—the taxpayer's furnishing capital to other enterprises at the same time and long after it had ceased making further advances to Central (Br. 25-28), the sale of all the assets of Gas Fuel and Kettleman in 1939 (Br. 29-32), the suspension of the corporate charters of Central, Gas Fuel and Kettleman on January 6, 1940 (Br. 33-34), the letter of December 2, 1940, to the Revenue Agent from Ralph W. Moore, the principal officer of those three corporations, giving his opinion that the subsidiaries' stock became worthless early in 1939, as claimed by certain stockholders of Central (Br. 34-38), and the failure of all negotiations to dispose of Gas Fuel's certificate by the end of 1940 (Br. 38-39). In these circumstances, the taxpayer states that the Tax Court failed to apply the correct principles of law in making its decision. (Br. 40-49.)

These contentions are untenable, and in no wise refute the Tax Court's findings. We have shown that the two items in question, claimed as losses sustained in 1942, plainly became worthless prior thereto. Moreover, it is clear that the revocation of Gas Fuel's certificate in 1942 could not have been, as alleged by taxpayer, the identifiable event which determined and fixed the time of worthlessness. The facts show that the certificate had become worthless in the hands of its possessor long before 1942. The certificate could have had no greater value than its demonstrated ability to produce earnings, which were practically nil at the end

of 1937 (R. 400-401), and totally so at the end of 1939 (R. 403-404). It was of such character as to be granted only by the State according to the needs of the community and the ability of the applicant to fulfill them, and was therefore clearly not negotiable or saleable by its possessor. Consequently, it must necessarily have been wholly devoid of monetary or even potential value so long as Gas Fuel was, as the facts show, without a gas supply, or the possibility of getting such supply as well as the necessary financial aid to construct a new gas distributing system, and therefore unable to make any use of it at any time after 1939. (R. 398-404.) The taxpayer admits that it “*never* had at its disposal funds in the amount that would have been necessary to develop a [new] gas utility system on the scale” requisite to revive Gas Fuel’s business in order to serve its customers, and thereby utilize its certificate. (Br. 26.) In harmony therewith, it states that “Petitioner’s capital resources were decidedly limited, and thus petitioner could not materially alter the [defunct] status of Central”. (Br. 26-27.) This indeed shows absence of potential value in the certificate.

There is further evidence showing lack of potential value in Gas Fuel’s certificate prior to January 1, 1942. Thus, the taxpayer’s expert witness Bauer testified on cross-examination that under the circumstances here Gas Fuel’s certificate would have “little or no value” as of the end of 1939, 1940 or 1941, and that the potential value thereof during the three-year period 1939-1941 would have depended on the possibility of the certificate holder’s making a factual showing—absent here—that it would be able to obtain a gas supply and a new distributing system.¹⁰ (R. 359-361.) Witness

¹⁰ Witness Bauer’s testimony that Gas Fuel’s certificate had potential value as of January 1, 1942, was based on the *assumption* that Gas Fuel had a source of gas supply at prices and in quan-

Ralph W. Moore's testimony as to value, moreover, was a series of contradictions. Thus, he testified that he was of the opinion that the stock here in question had at all times "substantial value to somewhere along in March or April * * * in 1942". (R. 205.) In refutation thereof, it is necessary merely to refer to his letter of December 2, 1940, to the Internal Revenue Agent in direct contrariety thereto. (R. 210-212, 404.) There he gave his appraisal of the stock, assets (including Gas Fuel's certificate), and probabilities of the successful operation of Central and its two subsidiaries, stating that, as principal officer of Central, Gas Fuel and Kettleman, it was his opinion that Gas Fuel's certificate was of "questionable value", dependent upon its ability to earn profits from operations, all of which had been suspended, and that the stock of the three corporations, including Central, became "practically worthless"¹¹ in the early part of 1939. (R. 211, 212, 224, 228, 404.) This was in reply to the Revenue Agent's letter of November 22, 1940,

ties which would have been profitable for re-sale purposes as of that date, and that there would be a possibility that it could also raise the necessary funds through public or private financing with which to build a new gas distributing system as of January 1, 1942 (R. 340-344); but that it would not have such value if, as shown, Gas Fuel had no such source of supply and possibility of financial assistance (R. 345-349). Moreover, witness Bauer admitted that he knew nothing about the operation of Gas Fuel with respect to the utilization of its certificate, or as to the conditions prevailing at any time with respect to its prospects of obtaining a gas supply or financial aid necessary to construct a new gas distributing system. Hence, having no knowledge of the facts of record, he was obliged to testify on the basis of assumed facts. (R. 355-357, 361-362.)

¹¹ Witness Moore, in explanation of what he meant by the use of the words "practically worthless" in the letter to the Revenue Agent, testified that "My use of that word was based upon the asset values shown in the balance sheet and on the books [of Central, Gas Fuel and Kettleman]. The stock as a stock certificate was practically worthless at that time" [early 1939]. (R. 224, 228.) The record shows that the asset values of the three corporations were nil at that time. (R. 400-402.)

advising him that Central's stockholders were then claiming that its stock became worthless in 1939, and requesting that he furnish information covering "any event which in your opinion rendered the stock worthless." (R. 208-209, 404.) Moreover, witness Moore having previously testified that he first found out in March or April, 1942, that it would be impossible to obtain a gas supply for Gas Fuel (R. 206), later contradicted this statement. Thus, he testified, in reply to the question as to how long he had had "honest hopes of getting gas production back into operation", that "the date would be in '41." (R. 220.) It is settled that the Tax Court is not bound by such testimony, whether or not uncontradicted, and particularly that of an interested witness, as here. *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620, 627-628; *Quock Ting v. United States*, 140 U. S. 417, 420-421; *Joe Balestrieri & Co. v. Commissioner*, 177 F. 2d 867, 873-875 (C. A. 9th); *Grace Bros. v. Commissioner*, 173 F. 2d 170, 174 (C. A. 9th); *Spero-Nelson v. Brown*, 175 F. 2d 86, 90 (C. A. 6th); *Friend v. Commissioner*, 102 F. 2d 153 (C. A. 7th).

Furthermore, witness Moore's failure to disclose all the facts—in respect to Gas Fuel's non-compliance with the requirements and conditions of the certificate—in his correspondence with the California Railroad Commission during the period 1939-1941 (R. 140-164, 403), demonstrates quite plainly, by implication at least, the unreliability of his testimony with respect to the alleged potential value of Gas Fuel's certificate. Thus he failed to reveal in the letters to the Commission the facts in respect of Gas Fuel's disposition of its distributing system, suspension of its charter, loss and impossibility of regaining its gas supply, and discontinuance of its operations requisite under the certificate, blaming the cessation of Gas Fuel's activities entirely on floods occurring in 1937 or 1938, because of which its

customers, he stated, allegedly demanded no gas supply and would not need it until the spring of 1941. (R. 142, 151, 155, 158-159, 163-164, 403, 407-408.) In these circumstances, witness Moore's "Silence then becomes evidence of the most convincing character." *Interstate Circuit v. United States*, 306 U. S. 208, 226.

Finally, it is clear that Gas Fuel's certificate had no real or potential value after the suspension of Central's and its subsidiaries' charters, including Gas Fuel's, on January 6, 1940. (R. 402.) Thereafter, all those corporations and their officers, directors and stockholders were precluded by local law from borrowing money by note or otherwise, accepting subscriptions for or selling stock, and carrying on any further operations or business of any nature. Section 32, California Bank and Corporation Franchise Tax Act (Appendix, *infra*); *Silvey v. Fink*, 99 Cal. App. 528, 531-532, 279 Pac. 202, 203-204; *Van Landingham v. United Tuna Packers*, 189 Cal. 353, 362-372, 208 Pac. 973, 976-980. Hence, in the absence of payment of all taxes, interest, penalties, etc., and the possible issuance of a certificate of revivor (Section 33, California Bank and Corporation Franchise Tax Act (3 Deering's General Laws, Act 8488): Pet. Br. 4-5), no use whatever could be made of Gas Fuel's certificate. Any subsequent revival of their corporate rights would not have had the effect of validating their acts attempted during the period of suspension for a certificate of revivor, if issued, is not made retroactive by the statute. Section 33, California Bank and Corporation Franchise Tax Act; *Van Landingham v. United Tuna Packers*, *supra*, p. 369; *Ransome-Crummey Co. v. Superior Court*, 188 Cal. 393, 396-397, 205 Pac. 446, 448. Hence, there was no real or potential value inherent in Gas Fuel's certificate after suspension of its charter in 1940. Central and its subsidiaries, of course, could not use it thereafter, and there was little,

if any, likelihood that third parties would have been interested in acquiring it from *them*, even assuming that they could do so. It was admittedly obtainable, without cost, only from the Railroad Commission; hence, third parties would not have been apt to put themselves in the position of acquiring it from Central or its subsidiary, Gas Fuel, whose officers, directors and stockholders would have been unable to consummate the deal, and would have subjected themselves to criminal action if they had performed any of the prohibited acts. Section 32 (a), California Bank and Corporation Franchise Tax Act; *Van Landingham v. United Tuna Packers, supra*, pp. 370-372; *Ransome-Crummey Co. v. Superior Court, supra*, pp. 396-397. In these circumstances, since the certificate was not ~~sole~~ saleable, the suspended corporation was precluded under penalty of law from selling it, and Gas Fuel did not have, could not and was not allowed by law to obtain the funds necessary to make use of it (*Silvey v. Fink, supra*, pp. 531-532), as required by the certificate (R. 49-62, 63-70, 401). It must be considered, therefore, for all practical as well as tax purposes, to have been without value, potential or otherwise, after 1937 or 1939 at the latest, and in any event prior to 1942 (R. 400-404, 406, 407-409).

In these circumstances, it is quite apparent that Central and its subsidiaries had not only ceased operations and abandoned the assets of the latter (R. 398, 400-402), but also had, in effect, abandoned Gas Fuel's certificate. Just as the subsidiaries had abandoned all their lands, leases and wells as of the end of 1935 (R. 398), so Gas Fuel—having lost its contract for gas supply and ceased all operations after November 11, 1937 (R. 400-401), become totally inactive after June 30, 1939 (R. 72, 249, 403-404), lost its corporate charter by suspension on January 6, 1940 (R. 402), and having no possible further use or *useability under local law* for its certificate—

had, in effect, abandoned the certificate to all intents and purposes long before it was *formally* revoked in 1942. It could have been revoked for noncompliance with its requirements at any time after 1939 (R. 49-51, 397, 408-409), and Gas Fuel's total noncompliance after November 11, 1937, was indeed tantamount to complete abandonment. Further support is given to this conclusion by the letter of March 17, 1941, from the Railroad Commission to Central stating that its engineer, Crenshaw, had discussed the situation with the officers of Central and Gas Fuel on March 4, 1941, and had been advised that it was their (R. 160) "intention to permanently abandon gas service"—and, therefore, by inference, also the certificate at that time (R. 160-162, 403); and also by Gas Fuel's letter of June 9, 1942, to the Commission stating that it was no longer operating and had been inactive for three years prior thereto (R. 249-250, 403-404). Moreover, as heretofore shown, since Central and Gas Fuel were specifically precluded by law from using or even attempting to raise funds to make use of the certificate during Gas Fuel's corporate charter suspension, extant since January 6, 1940 (R. 402), it was necessarily not *useable* thereafter under any circumstances (*Van Landingham v. United Tuna Packers, supra*; *Silvey v. Fink, supra*; *Ransome-Crummey Co. v. Superior Court, supra*), and therefore without any value since that time, regardless of when the certificate was *formally* revoked.

Since the present case turns on its own facts, as the taxpayer admits (Br. 19), the many cases cited by it (Br. 19-20, 22-24, 28-29, 42-49) which involve different factual situations need not be discussed. Precedents involving distinctive facts are of no great value. *American Trust Co. v. Commissioner*, 31 F. 2d 47, 49 (C.A. 9th). The taxpayer has cited no case containing the same or similar factual situation involved here.

CONCLUSION

The decision of the Tax Court is correct, and should therefore be affirmed upon review by this Court.

Respectfully submitted.

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FEBRUARY, 1950.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

(g) *Capital Losses.*—

* * * * *

(2) *Securities becoming worthless.*—If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purposes of this chapter, be considered as a loss from the sale or exchange, on the last day of such taxable year, of capital assets.

(3) *Definition of securities.*—As used in this subsection the term “securities” means (A) shares of stock in a corporation, and (B) rights to subscribe for or to receive such shares.

(4) [As added by Sec. 123 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Stock in affiliated corporation.*—For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset. * * *

* * * * *

(k) [As amended by Sec. 113 (a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] *Bad Debts.*—

(1) *General Rule.*—Debts which become worthless within the taxable year; or (in the discretion of the Commissioner) a reasonable addition to a reserve for bad debts; and when satisfied that a debt is recoverable only in part, the

Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 122 [As added by Sec. 211 (b) of the Revenue Act of 1939, c. 247, 53 Stat. 862, and amended by Sec. 153 (a) of the Revenue Act of 1942, *supra*]
NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operating Loss.*—As used in this section, the term “net operating loss” means the excess of the deductions allowed by this chapter over the gross income, with the exceptions and limitations provided in subsection (d).

(b) *Amount of Carry-Back and Carry-Over.*—

* * * * *

(2) *Net operating loss carry-over.*—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4) and (6), and computed by determining

the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year).

* * * * *

(26 U. S. C. 1946 ed., Sec. 122.)

California Bank and Corporation Franchise Tax Act (3 Deering's General Laws, Act 8488):

Section 32. *Suspension and forfeiture of corporate powers.*

(a) [*Powers, rights and privileges of delinquent corporation to be suspended or forfeited.*] If any tax, or any portion thereof, together with penalties, and interest thereon, which is due and payable either at the time the return is required to be filed or on or before the fifteenth day of the ninth month following the close of the income year, is not paid on or before six o'clock p.m. on the last day of the twelfth month after the close of the income year or if any tax due and payable upon notice and demand from the commissioner, together with penalties and interest thereon, is not paid on or before six o'clock p.m. on the last day of the eleventh month following the due date of such tax, except in case of jeopardy or fraud assessments, in which case, if such tax, interest and penalties are not paid within 40 days from the date such tax, penalties and interest are due and payable (unless the bond required by this act is filed to stay the collection of such tax, penalties and interest and such tax, interest and penalties are paid within 60 days after notice by the commissioner on taxpayer's petition for reassessment), the corporate powers, rights and privileges of the delinquent taxpayer, if it be a domestic bank or corporation, shall be suspended and shall be incapable of being exercised for any purpose or in any manner except for the purpose of amending the articles of incorporation to set forth a new name; if the delinquent taxpayer be a foreign bank or corporation the right to exercise

its corporate powers, rights and privileges in this State shall be forfeited.

* * * * *

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.23 (e)-1. *Losses by Individuals.*—* * *

* * * * *

In general losses for which an amount may be deducted from gross income must be evidenced by closed and completed transactions, fixed by identifiable events, bona fide and actually sustained during the taxable period for which allowed. Substance and not mere form will govern in determining deductible losses. * * *

* * * * *

SEC. 29.23 (f)-1. *Losses by Corporations.*—Losses sustained by domestic corporations during the taxable year and not compensated for by insurance or otherwise are deductible in so far as not prohibited or limited by sections 23 (g), 23 (h), 24 (b), 112, 117, 118, and 251. The provisions of sections 29.23 (e)-1 to 29.23 (e)-5, inclusive, and section 29.23 (i)-1 are in general applicable to corporations as well as individuals. * * *

SEC. 29.23 (g)-1 [As amended by T. D. 5458, 1945 Cum. Bull. 45] *Capital Losses.*—Section 23 (g) provides in effect that deductions allowed to individuals under section 23 (e) and to corporations under section 23 (f) for losses sustained on the sale or exchange of a capital asset shall be limited in amount to the extent provided in section 117. Losses sustained by virtue of securities becoming worthless during the taxable year are, under section 23 (g), made subject to the limitations provided in section 117 with respect to sales or exchanges, provided the securities are “capital assets” as that term is defined in section 117 (a) (1). For purposes of computing the net income of any taxpayer, such losses are to be considered as being sustained from the sale or exchange of the securities on the last

day of the taxable year, irrespective of when during the taxable year such securities actually became worthless. Section 23 (g) does not apply to securities which are deemed destroyed or seized under section 127, relating to war losses.

As used in section 23 (g) and this section the term "securities" means shares of stock in a domestic or foreign corporation and rights to subscribe for or to receive such shares.

* * * * *

SEC. 29.23 (k)-1 [As amended by T. D. 5376, 1944 Cum. Bull. 119]. *Bad Debts.*—(a) Bad debts may be treated in either of two ways—

(1) By a deduction from income in respect of debts which become worthless in whole or in part, or

* * * * *

(b) If, from all the surrounding and attending circumstances, the Commissioner is satisfied that a debt is partially worthless, the amount which has become worthless, to the extent charged off during the taxable year, shall be allowed as a deduction in computing net income. If a taxpayer claims a deduction for a part of a debt for the taxable year within which such part of the debt is charged off and such deduction is disallowed for such year and the debt becomes partially worthless subsequent to such year, a deduction may be allowed for a subsequent taxable year, not in excess of the amount charged off in the prior year plus any amount charged off in the subsequent year, the charge-off in the prior year, if consistently maintained as such, being sufficient to that extent to meet the charge-off requirement. Before a taxpayer may deduct a debt in part, he must be able to demonstrate to the satisfaction of the Commissioner the amount thereof which is uncollectible and the part thereof which was charged off. If a debt becomes wholly worthless during the taxable year, the amount thereof which has not been allowed as a deduction for any prior taxable year shall be allowed as a deduction for the taxable year. * * *. In determining

whether a debt is worthless in whole or in part the Commissioner will consider all pertinent evidence, including the value of the collateral, if any, securing the debt and the financial condition of the debtor. * * *

Where the surrounding circumstances indicate that a debt is worthless and uncollectible and that legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, a showing of these facts will be sufficient evidence of the worthlessness of the debt for the purpose of deduction. Bankruptcy is generally an indication of the worthlessness of at least a part of an unsecured and unpreferred debt. * * *

* * * * *

No. 12302.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CAPITAL SERVICE, INC., a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF OF PETITIONER.

FILED

FEB 20 1950

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TOPICAL INDEX

PAGE

I.

| | |
|---|---|
| Petitioner and respondent are in accord as to the issue to be decided in this appeal..... | 1 |
|---|---|

II.

| | |
|---|---|
| The decision of the Tax Court, which is based upon a finding that the stock and debt of Central became worthless prior to 1942, is not supported by any evidence..... | 2 |
| A. Preliminary statement | 2 |
| B. Point by point consideration of the evidence which respondent contends specifically shows worthlessness of the stock and debt of Central prior to 1942..... | 3 |
| Comment on items (a) and (b)..... | 3 |
| Comment on item (c)..... | 4 |
| Comment on item (d)..... | 5 |
| C. The letter written to Ralph Moore on November 22, 1940, by an agent of the Bureau of Internal Revenue, and Moore's letter in response thereto dated December 2, 1940 | 8 |
| D. The value of the certificate of convenience and necessity possessed by the Central system..... | 9 |

III.

| | |
|--|----|
| Statement with respect to the identifiable events upon which petitioner relies to fix the worthlessness of the stock and debt of Central in the year 1942..... | 14 |
|--|----|

IV.

| | |
|---|----|
| The Tax Court, in making its decision, did not apply the correct principles of law..... | 15 |
| Conclusion | 16 |

INDEX TO APPENDIX

| | PAGE |
|---|------|
| Statutes cited in the Reply Brief: | |
| Internal Revenue Code, Sec. 23. Deductions From Gross Income (26 U. S. C. A., Sec. 23)..... | 1 |
| Internal Revenue Code, Sec. 122. Net Operating Loss Deduction (26 U. S. C. A., Sec. 122)..... | 1 |

TABLE OF AUTHORITIES CITED

| CASES | PAGE |
|--|------|
| Boehm v. Commissioner, 326 U. S. 287, 66 S. Ct. 120..... | 13 |
| Permanente Metals Corp. v. Pista, 154 F. 2d 568..... | 12 |

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CAPITAL SERVICE, INC., a Corporation,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF OF PETITIONER.

I.

Petitioner and Respondent Are in Accord as to the
Issue to Be Decided in This Appeal.

Respondent has indicated (Resp. Br. 14) that it is in accord with petitioner's statement as to the issue involved in the instant case:

"The sole question to be decided in this appeal is whether petitioner sustained in the calendar and taxable year 1942 a net operating loss, as defined in Section 122(a) of the Internal Revenue Code (26 U. S. C. A., section 122(a)), which may be carried over and used as a net operating loss deduction for the calendar and taxable year 1943, as provided for by Section 122(b)(2) of the Internal Revenue Code (26 U. S. C. A., section 122(b)(2)).

“The determination of the question presented depends upon whether the indebtedness of \$31,567.81 owed to petitioner by, and stock at an adjusted cost basis of \$1,300 held by petitioner in, the Central California Utilities Corporation became worthless during the calendar and taxable year 1942, as contended by petitioner, thus permitting deductions to be made from the gross income of petitioner for the year 1942 under the provisions of Sections 23(k) and 23(f), respectively, of the Internal Revenue Code (26 U. S. C. A., Sections 23(k) and 23(f)), or prior to said calendar and taxable year, as contended by respondent.” (Pet. Br. 5.)

II.

The Decision of the Tax Court, which Is Based Upon a Finding That the Stock and Debt of Central Became Worthless Prior to 1942, Is Not Supported by Any Evidence.

A. Preliminary Statement.

Respondent contends that the decision of the Tax Court sustaining the determination of respondent is supported by substantial evidence, and frequently adverts to the well recognized rule that the decision of a lower court is conclusive upon review, if supported by substantial evidence. (Resp. Br. 13, 20.) However, it is one thing merely to assert that substantial evidence exists, and quite another to refer to the record below and point out such evidence.

Petitioner respectfully urges herein that the decision below is not only not supported by substantial evidence, but is supported by no evidence at all.

B. Point by Point Consideration of the Evidence Which Respondent Contends Specifically Shows Worthlessness of the Stock and Debt of Central Prior to 1942.

Let us carefully scrutinize the evidence adduced below, which respondent contends (Resp. Br. 17-20) specifically shows worthlessness of the stock and indebtedness of Central prior to 1942:

(a) "Kettleman's only gas well blew out early in 1935 thus depriving Gas Fuel of gas to supply its 10 or 12 customers. [R. 96, 299, 397.]" (Resp. Br. 17.)

(b) "The serious financial difficulties by the end of 1935 of Inland, Gas Fuel and Kettleman—taken over by Central in 1936 [R. 394-395]—showed that their combined liabilities exceeded their assets by more than \$58,000, and that their lands, leases and wells of a book value in excess of \$1,100,000 were eliminated by quitclaims and abandonment as of December 31, 1935. [R. 283-285, 288-289, 398.]" (Resp. Br. 17.)

COMMENT ON ITEMS (a) AND (b):

It is to be noted that the events referred to in (a) and (b), *supra*, occurred *prior* to the formation of Central. The respondent at no place in the record introduced evidence, or even inferred, that the stock and debt of Central were worthless immediately upon its formation in 1936; nor did the Tax Court in its decision so rule. The Tax Court, in its opinion [Tr. 409], although it does not pin-point the year in which it concluded that the two items became worthless, uses verbiage, the flavor of which suggests that the Court looked upon 1939 or 1940 as the

year in which worthlessness occurred. Respondent in another portion of its brief (Resp. Br. 22) states:

“ . . . it is plain that there were many identifiable events demonstrating that both the stock and indebtedness in question were utterly worthless at least after December 31, 1939, and in any event at the end of 1941.”

It seems clear that respondent in citing the events referred to in (a) and (b), *supra*, as events specifically showing worthlessness of the stock and indebtedness of Central, prior to 1942, has adopted a position not relied upon by the Tax Court itself, and one in which respondent itself has no conviction.

(c) “The reorganization plan in 1936, under which Central was created to take over and operate the business of Inland [R. 394-395], and whereby the taxpayer acquired an additional 1,050 of Central’s shares, proved totally unsuccessful [R. 205-207, 210, 298-299, 398-399, 400-403, 407-409; Pet. Br. 12.]” (Resp. Br. 17.)

COMMENT ON ITEM (c):

Respondent here attempts to use as a “fact” showing worthlessness of the stock and indebtedness of Central, prior to 1942, a situation not borne out by the record below. “*Operations*” were never the purpose of petitioner with respect to Central. Petitioner was interested only in a speculative profit. [Tr. 318-319, 330.] The loan that petitioner had made to the Central system was given for the purpose of placing that system in a condition in which it could be publicly financed, through sale of the

authorized, but unissued, shares of Central, or in a posture which would enable petitioner to sell its stock interest to other managers, who would themselves attempt to finance the enterprise. [Tr. 232-234, 320.]

It seems clear that the fact that the speculation in which petitioner engaged ultimately failed, is not a fact which *specifically* shows worthlessness of the stock and indebtedness of Central prior to 1942.

(d) "The taxpayer advanced large sums to Central during 1936 and 1937, and a final advance of only \$50 in January, 1938, resulting in a net indebtedness, never paid, of \$31,567.81 owed by Central as of April 30, 1940 [R. 73-75]. This amount, however, the taxpayer, despite the absence of *anything* showing value after the end of 1940 [R. 359-361, 408-409], was not charged off as a loss by the taxpayer until December 31, 1941 [R. 399-400]." (Resp. Br. 18.)

COMMENT ON ITEM (d):

The government here is urging the premise that because the indebtedness of Central was never paid, obviously a hindsight fact, we may conclude that the indebtedness became devoid of all value, including potential value, prior to 1942!

The respondent also concludes, and it is merely a conclusion, that the indebtedness of Central owing to petitioner, was valueless after the end of 1940. Respondent obviously has chosen to overlook the basic elements of the Central enterprise, which existed continuously from 1936 to 1942, and which had originally aroused the interest of

petitioner in the Inland-Central system: (1) The certificate of public convenience and necessity which gave Central, through Fuel, its subsidiary, the right to distribute and sell natural gas in Fresno and Kings counties; (2) the supply of natural gas in the area; and (3) the potential market for that gas in Fresno and Kings counties. [Joint Ex. No. 1-A, Tr. 32; Joint Ex. No. 2-B, Tr. 49; Joint Ex. No. 7-G, Tr. 71; Tr. 94-95, 99, 100, 111-112.] Petitioner will further discuss the potential value of the certificate of public convenience and necessity, *post*. Suffice it to say here that the aforementioned *conclusion* of respondent can in no wise be determinative.

(e) Respondent lists the following facts found by the Tax Court as the remaining facts specifically showing worthlessness of the stock and debt of Central, prior to 1942:

1. Kettleman's lack of success in bringing in gas wells upon land leased by it. (Resp. Br. 18.)
2. Fuel's discontinuance of its purchases of gas from Southern California Gas Co., because of the lack of efficiency of the gas distribution system. (Resp. Br. 18.)
3. Central's failure to distribute gas after 1937. (Resp. Br. 18.)
4. Central's obtaining of permission from the California Railroad Commission to temporarily discontinue service under its certificate of public convenience and necessity, in 1938. (Resp. Br. 18.)
5. The sale of the physical assets of Fuel and Kettleman in 1939. (Resp. Br. 18-19.)

6. Suspension of the corporate charters of Central, Fuel, and Kettleman in 1940. (Resp. Br. 19.)
7. The letter of Ralph Moore, dated December 2, 1940, in response to a letter written to Moore on November 22, 1940, by an agent of the Bureau of Internal Revenue. (Resp. Br. 19.)

Items 5-7 have been discussed at length in the opening brief of petitioner, and will be discussed *post* in the light of argument made in the brief of respondent.

Items 1-4 are findings which do not support the ultimate finding of the court below that the stock and debt of Central became worthless prior to 1942.

At the risk of being repetitious, petitioner desires to emphasize that in its dealings with the Central system, it was engaging in a *speculation* of the type familiar in our economy. [Tr. 192-195, 218, 224, 232-234, 320.] It had been determined that in Fresno and Kings counties, a need existed for an inexpensive source of power for irrigation pumping purposes. [Tr. 37-38.] It was also found that natural gas, a commodity which could be used in satisfying this need, existed in abundance in the same area. [Tr. 87, 94-100.] Petitioner sought to *organize* a natural gas utility system, which was to operate under the certificate of public convenience and necessity possessed by Fuel. Petitioner expected to profit ultimately by a sale of the promoter's stock which it held in Central. [Tr. 318-319, 330.]

Petitioner was in no sense interested in the Inland-Central system as a presently operating utility. The basic reason for supplying the 10 or 15 customers who formerly had been served by the Inland system, was to insure the retention of the certificate of public convenience and nec-

essity, which, in petitioner's considered estimation was the keystone of the entire enterprise. (Pet. Br. 29-32.) When the danger of rescission of the certificate was lessened by permission of the California Railroad Commission to temporarily discontinue service, petitioner used this opportunity to cease the above mentioned minimal function entirely. (Pet. Br. 15.)

The Tax Court and respondent have taken the evidence adduced by petitioner, and attempted to place it within a frame of reference which the record will not support. To view the Central system as small operating utility, the stock and debts of which became worth successively less, as it ceased to function, and disposed of its physical assets, is to distort completely the objective, factual situation, which reveals that the Central enterprise was a speculation at the outset in 1936, and remained so until 1942, in which year the basic elements upon which the speculation was based, were markedly altered. [Tr. 232-234, 320, 322, 350-351.]

C. The Letter Written to Ralph Moore on November 22, 1940, by an Agent of the Bureau of Internal Revenue, and Moore's Letter in Response Thereto Dated December 2, 1940.

The decision of the Tax Court is to a large extent based upon the material contained in Ralph Moore's letter of December 2, 1940. [Tr. 409.] Respondent also places heavy reliance upon this letter in its brief. (Resp. Br. 19, 27.) In its opening brief, petitioner carefully pointed out that there is serious doubt, as a matter of law, whether Moore was impeached by cross-examination with respect to the contents of the aforementioned letter. (Pet. Br. 35-36.) Petitioner argued in its opening brief that even if

it may be concluded that Moore was impeached, the court below could not properly use the contents of Moore's reply letter as evidence of the value of the stock of Central, for the following reasons: (1) Moore was not qualified as an expert witness with respect to the question of the value of the stock, and (2) prior inconsistent statements of witnesses, used for purposes of impeachment, may not be treated as having independent testimonial value. (Pet. Br. 36-38.)

It is to be noted that respondent has in no wise attempted to argue the legal propositions raised by petitioner against the use of this evidence to support the decision below. It is respectfully submitted that reliance upon the contents of the letter of Ralph Moore is erroneous, and that said evidence may not properly be cited in support of the determination of the Tax Court.

D. The Value of the Certificate of Convenience and Necessity Possessed by the Central System.

Respondent devotes a good deal of attention in its brief to the question of the value of the certificate of convenience and necessity possessed by Fuel. (Resp. Br. 25-31.) Petitioner in its opening brief discussed the failure of the Tax Court to appraise fully the value of this asset. (Pet. Br. 30-32.) Petitioner now will meet the argument of respondent with respect to this issue.

Respondent espouses the following thesis: "The certificate could have had no greater value than its demonstrated ability to produce earnings. . . ." (Resp. Br. 25.) On its face, respondent has adopted a measure for determining actual or intrinsic value. While "demonstrated ability to produce earnings" may be a proper test for the ascertainment of intrinsic value, it is of no as-

sistance in the determination of whether an asset has potential value.

Respondent, on page 26, *et seq.*, of its brief, displays the erroneous basis upon which it seeks to uphold the decision below. Respondent suggests that the following factors show the absence of potential value in the certificate:

- (1) The certificate was of such nature as to be clearly not negotiable or saleable by its possessor (Resp. Br. 26);
- (2) Gas Fuel was without gas supply, and without the possibility of obtaining a gas supply, and financial aid to construct a new gas distributing system after 1939 (Resp. Br. 26);
- (3) Petitioner's statements on page 26 of its opening brief that: "Petitioner *never* had at its disposal funds in the amount that would have been necessary to develop a gas utility system on the scale contemplated by petitioner and Moore" and that "Petitioner's capital resources were decidedly limited, and thus petitioner could not materially alter the status of Central." (Resp. Br. 26);
- (4) The certificate of convenience and necessity had no intrinsic or potential value after the suspension in 1940 of the charters of Fuel, Central and Kettleman (Resp. Br. 29-31).

Petitioner respectfully submits that the aforementioned conclusion with respect to the absence of potential value in the certificate, based upon the foregoing factors, is not only a logical *non sequitur*, but is not borne out by the evidence set forth in the record below.

Respondent has adopted a completely impractical position in asserting that the certificate was not negotiable or saleable by its possessor, in view of its having been granted by the State, according to the needs of the community. Petitioner at no time intended to transfer the certificate itself—it planned to sell its *stock interest* in Central, which latter company owned the stock of Fuel, as well as Kettleman. [Tr. 318, 319, 330.] Thus, lack of negotiability of the certificate is a factor that need not be discussed further.

Respondent takes the position that Fuel was without the possibility of obtaining a gas supply after 1939. Respondent at no place in the record introduced evidence establishing that a supply of gas was not available in the oil rich areas of Fresno and Kings counties. However, petitioner introduced evidence clearly establishing that the physical availability of natural gas was not a problem for the Central system until the year 1942. [Tr. 100, 176-179, 350-351.]

Thus, Roy M. Bauer, expert witness of petitioner, who stated that a corporation which held on January 1, 1942, a certificate of public convenience and necessity to distribute natural gas in Fresno and Kings counties, and also

had the possibility of raising funds, either through public or private financing, and had a source of gas supply, at prices enabling it to sell at a profit, and also a potential supply of customers in the area, was the possessor of an asset of *potential* value, arrived at a conclusion with respect to an hypothetical question the basic factors of which were borne out by the evidence. [Tr. 340-344.]

In its footnote on pages 26-27 of its brief, respondent raises the point that Bauer had no personal knowledge of the Central system, and therefore had to testify on the basis of *assumed* facts. It must be pointed out that expert witnesses *must*, as a matter of law, testify upon the basis of hypothetical or assumed facts. *Permanente Metals Corp. v. Pista* (1946 U. S. C. A. 9th), 154 F. 2d 568, 569.

Respondent is unrealistic in its assertion that the fact that petitioner did not have sufficient funds at its disposal to develop the Central system indicates an absence of potential value in the certificate. Petitioner must again assert that respondent, in making such a statement completely avoids the evidence which establishes that petitioner was engaged in a speculative enterprise—that petitioner sought capital from public and private sources, for the primary purpose of enabling it to dispose of its stock interest in Central at a profit. [Tr. 232-234, 320.]

Respondent also devotes a substantial portion of its brief to the thesis that the certificate of convenience and necessity had no intrinsic or potential value after the sus-

pension in 1940 of the corporate charters of Fuel, Central, and Kettleman, for non-payment of corporate franchise taxes. (Resp. Br. 29-31.) It is to be noted that the suspension of said charters, which is fully discussed in petitioner's opening brief, did not affect the certificate possessed by Fuel, which remained in full force and effect, until October 6, 1942. [Pet. Br. 33-34; Tr. 71.]

Respondent's emphasis upon the matter of the suspension of corporate charters seems highly impractical, in view of the fact that whatever disability was caused by said suspension could have been quickly remedied under local law by payment of the delinquent taxes. (Pet. Br. 33-34.)

It would thus appear, that as a practical matter, and the United States Supreme Court has ruled that in this type of case, the practical approach should be adopted (*Boehm v. Commissioner*, 326 U. S. 287, 293, 66 S. Ct. 120, 124), the entire discussion of the "drastic" effects of the suspension of the corporate charters of Fuel, Central, and Kettleman upon the value of the certificate of public convenience and necessity, is rendered moot.

Respondent's conclusion (Resp. Br. p. 30) that the certificate was abandoned, in effect, after the suspension of the corporate powers of Fuel, has no foundation in the record. [Pet. Ex. No. 28, Tr. 165; Pet. Ex. No. 29, Tr. 172; Tr. 164-165, 170-172, 173-177, 238-240.] The continued efforts of petitioner to realize upon the stock and debt of Central, which efforts had as their basis the certificate possessed by Fuel, refute the conclusion of abandonment. Respondent adverts, in support of its contention of abandonment, to Petitioner's Exhibit No. 26, in which the Railroad

Commission mentioned, in a letter directed to Central, that one of its engineers had been advised that Fuel intended "to permanently abandon gas service." Respondent should have also called attention to the letter dated March 25, 1941, in response to the aforementioned letter of the Railroad Commission, in which Central denied that it was abandoning the certificate and affirmed the existence of negotiations "looking forward to the possible resumption of the Gas Fuel Service Company under its franchise." [Pet. Ex. No. 27, Tr. 163.]

III.

Statement With Respect to the Identifiable Events Upon Which Petitioner Relies to Fix the Worthlessness of the Stock and Debt of Central in the Year 1942.

Respondent has stated in its brief that petitioner contends that formal revocation of the certificate of Fuel on October 6, 1942, was the identifiable event which indicated *complete extinguishment* of all value, and fixed the worthlessness, of the stock and debt of Central in that year. (Resp. Br. 25.)

Petitioner wishes to correct this misconception on the part of the government, and directs the attention of the Court to page 50 of its opening brief on appeal, in which petitioner has carefully set forth the sudden changes in the economic outlook which occurred in 1942, and which drastically affected the speculation in which petitioner had engaged. Petitioner contends that the formal act of

revocation of the certificate of public convenience and necessity is just one of the identifiable events which fix the loss on the stock and debt of Central in the year 1942. The other identifiable events upon which petitioner relies are: (1) The disappearance of surplus gas in the area of Fresno and Kings counties in 1942, due to war needs, and (2) the practical impossibility in 1942 of obtaining capital for a basically non-war enterprise which could not be converted to war use.

IV.

The Tax Court, in Making Its Decision, Did Not Apply the Correct Principles of Law.

It is to be noted that respondent presents no argument in opposition to petitioner's contention in Point III of its opening brief that the Tax Court, in making its decision, did not apply the correct principles of law. Respondent summarily dismisses the cases cited in Point III-C of petitioner's opening brief, on the ground that since we are dealing with a question of fact in this appeal, "precedents involving distinctive facts are of no great value." (Resp. Br. 31.) Respondent has obviously failed to recognize that the cases cited by petitioner in Point III-C are cited not primarily for the factual situations therein presented, but to demonstrate the proposition that the Tax Court, in the instant case, failed to apply recognized principles of law, applicable to all cases involving the question of stock and debt worthlessness.

Conclusion.

Petitioner respectfully submits that the decision of the Tax Court, sustaining the determination of respondent that a deficiency in income tax in the amount of \$7,358.10 is owing by petitioner for the calendar and taxable year 1943, is clearly erroneous, and ought to be reversed and set aside.

Respectfully submitted,

HYMAN SMITH,

BARNET M. COOPERMAN,

Attorneys for Petitioner.

APPENDIX.

Statutes Cited in the Reply Brief.

Section 23, Internal Revenue Code. DEDUCTIONS FROM GROSS INCOME (26 U. S. C. A., Sec. 23):

“In computing net income there shall be allowed as deductions:

. . . (f) *Losses by Corporations.*—In the case of a corporation, losses sustained during the taxable year and not compensated for by insurance or otherwise.

. . . (k) *Bad Debts.* (1) *General Rule.* Debts which become worthless within the taxable year; or (in the discretion of the Commissioner) a reasonable addition to a reserve for bad debts; and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction. This paragraph shall not apply in the case of a taxpayer, other than a bank, as defined in section 104, with respect to a debt evidenced by a security as defined in paragraph (3) of this subsection. This paragraph shall not apply in the case of a taxpayer, other than a corporation, with respect to a non-business debt, as defined in paragraph (4) of this subsection.”

Section 122, Internal Revenue Code. NET OPERATING LOSS DEDUCTION (26 U. S. C. A., Sec. 122):

“(a) *Definition of Net Operating Loss.*—As used in this section, the term ‘net operating loss’ means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

(b) *Amount of Carry-back and Carry-over.* . . .
. . . (2) *Net operating loss carry-over.*—If for any taxable year the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-over for each of the two succeeding taxable years, except that the carry-over in the case of the second succeeding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the intervening taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such intervening taxable year without regard to such net operating loss and without regard to any net operating loss carry-back. For the purposes of the preceding sentence, the net operating loss for any taxable year beginning after December 31, 1941 shall be reduced by the sum of the net income for each of the two preceding taxable years (computed for each such preceding taxable year with the exceptions, additions, and limitations provided in subsection (d)(1), (2), (4), and (6), and computed by determining the net operating loss deduction without regard to such net operating loss or to the net operating loss for the succeeding taxable year).”



